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In the

SUPREME COURT OF THE UNITED STATES

October Term, 1967

No. 668

AMPLEX OF MARYLAND, INC.,
Petitioners

v.

OUTBOARD MARINE CORPORATION,

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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INDEX

OPINIONS BELOW 1
JURISDICTION 2
QUESTIONS PRESENTED 2
STATUTES INVOLVED 3
STATEMENT 4
REASONS FOR GRANTING THE WRIT 10
CONCLUSION 26
Appendix A—Opinion of the Court of Appeals A-1
Appendix B—Judgment of the District Court B-1

TABLE OF CASES

A. C. Becken v. Gemex Corp.,
272 F.2d 1 (1959) 20, 22

American Tobacco Co. v. United States,
327 U.S. 781 (1946) 20

Brown Shoe Co. v. United States,
370 U.S. 294 21

Continental Ore Co. v. Union Carbide and
Carbon Corp., 370 U.S. 690 24

FTC v. Procter & Gamble Co.,
386 U.S. 568 11

Jerke v. Delmont State Bank,
54 S.D. 446, 223 S.W. 585 24

Osborn v. Sinclair Refining Co., 287 F.2d 832
(4th Cir., 1960) and 324 F.2d 566 (4th Cir., 1963) 20, 22

Poller v. Columbia Broadcasting Co.,
368 U.S. 464 24

Standard Oil Co. of California v. United States,
337 U.S. 293 . . . . . 20, 21

United States v. Aluminum Co. of America, *et al.*,
148 F.2d 416 (2d Cir., 1945) 18, 22

United States v. Colgate, 250 U.S. 19 22

United States v. Griffith, 334 U.S. 100 20

United States v. Philadelphia National Bank, 374 U.S. 321, 364 19

STATUTES INVOLVED

Clayton Act, 38 Stat. 731, 15 U.S.C. 15 ..... 2, 3, 4, 20

Sherman Act, 50 Stat. 693, 15 U.S.C. 1 ..... 2, 3, 20, 22, 23

OTHER REFERENCES

American Industry: Structure, Conduct, Performance 103 (1964), Caves 15

Antitrust Policy 63 (1959), Kaysen and Turner 15

Barriers to New Competition 114 (1956), Joe S. Bain 11, 12

Industrial Organization 210 (1959), Joe S. Bain 11, 12

Moore's Federal Practice (3d ed.) Vol. 9, Sec. 2495 24

Oligopoly Power under the Sherman and Clayton Acts–From Economic Theory to Legal Policy, 19 Stanford Law Review 285 (Jan. 1967) 18

Statistical Abstract of the United States 830 10

Structure of Food Manufacturing 202-207 (1966), Technical Study No. 8, National Commission on Food Marketing 18

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The plaintiff, Amplex of Maryland, Inc., petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit entered in this case on June 1, 1967.

OPINIONS BELOW

The opinion of the court of appeals, (App. A, infra, A-1) is reported at __ F.2d __. The opinion of the District Court is unreported.

JURISDICTION

The judgment of the Court below (Appendix B, infra, B-1) was entered on June 1, 1967.

A timely Petition for Rehearing was denied on July 14, 1967. The jurisdiction of this Court is invoked under 28 U.S. Code Sec. 1254(1).

QUESTIONS PRESENTED

1. Whether it is a violation of Sections 1 or 2 of the Sherman Act or Section 3 of the Clayton Act for a manufacturer to cancel the franchises of dealers who refuse to stop selling the products of competing manufacturers, where the effect of those cancellations is to:

a. Preserve the manufacturer's approximately 60% share of its national market;

b. Exclude competing manufacturers from approximately 8,700 (or some 58% to 72%) of the estimated 12,000 to 15,000 retail outlets in the country, these being the largest and most efficient dealers, thus stifling the growth of existing competitors and creating severe cost and price barriers against the entry of new manufacturers;

c. Reproduce that same noncompetitive market structure at the dealer level in virtually every local market in the United States;

d. Ruin the larger dealers who attempt to sell a competing product, and restrict the freedom and business opportunities of those that acquiesce; and

e. Impose on the consuming public a supercompetitive price for the product, one that exceeds the level that would be expected to prevail in an effectively competitive market by perhaps as much as 15%.

2. Whether the trial court in an antitrust case on its own motion, having heard the testimony of five (5) of the plaintiff's witnesses, and having then implied that it was going to

dismiss the case and having stated that it would require the plaintiff to make a proffer of proof as to its remaining evidence (including a proffer as to what its remaining forty-two (42) witnesses would testify to, if called), and having then rendered judgment against the plaintiff after hearing the proffer, has in fact used a "summary procedure" under which the plaintiff is entitled to have its proffered evidence accepted as true, including all favorable inferences (as the district court itself conceded here) or whether the procedure employed was analogous to a full trial on the merits, in which, as the court of appeals held here, the district court was entitled to "weigh and reject that proffered evidence and make "findings" wholly inconsistent with it;

STATUTES INVOLVED

Section 1 of the Sherman Act, 50 Stat. 693, 15 U.S.C. 1, provides in pertinent part as follows:

> Sec. 1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of the trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal.

Section 2 of the Sherman Act, 26 Stat. 209, 15 U.S.C. 2, provides in part as follows:

> Sec. 2. Every person who shall monopolize or attempt to monopolize, or combine or conspire with any person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor. . .

Section 3 of the Clayton Act, 38 Stat. 731, 15 U.S.C. 14, provides in part as follows:

> Sec. 3. That it shall be unlawful for any person engaged in commerce, in the course of such commerce, to lease or make a sale or contract for sale of goods, wares, merchandise, machinery, supplies,

> or other commodities . . . on the condition, agreement or understanding that the lessee or purchaser thereof shall not use or deal in the goods . . . of a competitor or competitors of the lessor or seller, where the effect of such lease, sale, or contract for sale or such condition, agreement or understanding may be substantially to lessen competition or tend to create a monopoly in any line of commerce.

Section 4 of the Clayton Act, 38 Stat. 731, 15 U.S.C. 15, provides in part as follows:

> Sec. 4. That any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides, or is found, or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.

STATEMENT

The plaintiff, Amplex of Maryland, Inc., located on Ritchie Highway, at Arnold, Maryland (near Annapolis) was a franchised marine dealer of Johnson Motors, a wholly owned subsidiary of the Outboard Marine Corporation, and was such for a period of some sixteen (16) months, from April of 1960 to the end of September 1961. In that period of time, the plaintiff became the largest purchaser of the defendant's engines in the State of Maryland, exceeding the purchases of defendant's second best customer in Maryland, Jenkins Marine, an Evinrude dealer,[1] by some 40% in 1961

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[1] The defendant, Outboard Marine Corporation, is the largest manufacturer of outboard motors in the United States; its brand names being the "Johnson," the "Evinrude," and the "Gale." These three brands are, or were, produced and sold by three separate divisions within the Outboard Marine corporate structure. As discussed more

(194 engines, for $85,000, compared to 177 engines for $60,048.00). All engines were sold by the Defendant on sight draft bill of lading.

On or about June 25, 1961, approximately three (3) months before the termination of its franchise, plaintiff acquired a small building (previously a Carvel frozen custard establishment) across the highway from its Outbaord Marine ("Johnson") dealership, and after having received its full inventory of just 12 Mercury engines on consignment,[2] commenced selling these engines from that second establishment. This new Mercury outlet was operated under a different trade name, Arundel Marine. Less than a week after opening this new place of business, on July 1, 1961, plaintiff received a telephone call from one of defendant's sales representatives, accusing plaintiff of being the owner of the competing Mercury establishment across the highway. Defendant's salesman said he was coming down to "investigate."

Upon arrival several weeks later, the defendant's sales representative, a Mr. Schiavina, in a heated discussion, informed plaintiff's president, a Mr. Nicholas Canzona, that unless he would agree to rid himself of the Mercury establishment across the highway, his Johnson franchise would not be renewed. This threat was made in the presence of four (4) other witnesses. Plaintiff refused to give up its Mercury business and, when the Johnson franchise expired on Septem-

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fully below, the "Johnson" and "Evinrude" engines are considered premium products and sell for considerably higher prices than the "Gale" engine, even though all three are technically identical (the only difference being in their covers or hoods, and in their paint jobs). The latter brand, the "Gale" (which, since 1963, is no longer produced) was primarily a "private brand" product (sold largely through Montgomery Ward under the latter's own private brand name), and was not included in the defendant's exclusive dealing activities described herein.

[2]Compared to the defendant's policy of cash on delivery. The defendant's engines are in such demand that it need not concern itself with credit terms or consignment arrangements. This is left to those manufacturers attempting to compete with the defendant.

ber 30, 1961 (defendant's contracts with its dealers expire automatically, as well as being cancellable upon 30 days notice, and hence must be affirmatively renewed at the end of each fiscal year), defendant refused to renew it. Plaintiff's business promptly collapsed with the withdrawal of the "Johnson" franchise and, in due course, this suit was filed by plaintiff seeking re-instatement as a Johnson dealer and damages under the Sherman Act for the business losses suffered since the cancellation.

Plaintiff presented the testimony of five (5) of its witnesses before being informed in effect by the district court that it was about to dismiss the case and that plaintiff must present the remainder of its evidence in the form of a proffer. Included in the testimony already received was that of plaintiff's president that, as a condition to his original enfranchisement as one of the defendant's dealers in April of 1960, he had been required to agree to "phase out" the competing line of outboard motors (the "Scott-Atwater" engine, manufactured by McCulloch Corporation) he had been handling since 1958. This was corroborated by the testimony of the Outboard Marine sales representative that he had in fact exacted such a condition or promise from the plaintiff (Amplex, in the spring of 1961, had virtually stopped purchasing Scott engines and gradually "phased out" its Scott inventory).

That salesman had testified further that the plaintiff was merely an "example" of the way he had effected an exclusive dealing policy among Johnson dealers. As he explained it in his testimony, the defendant Outboard Marine had followed a definite exclusive dealing policy up until 1956;[3] that this policy was changed "for a year or two" thereafter;

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[3]Litigation between defendant and the Federal Trade Commission ended with the entry of a cease and desist order directing the company to cease its exclusive dealing on June 27, 1956. *In re Outboard Marine Company,* Dkt. 5882, 52 FTC 1553 (June 27, 1956). The district court excluded any reference to the Commission's findings and orders in this proceeding.

that, within a period of some two years, an "unofficial policy" of exclusive dealing came into being, this policy being one that, while not "discussed" by the salesmen with their superiors, was "understood" by all concerned; and that he had personally recommended cancellation of a number of dealer franchises for the sole reason that the dealer refused to give up a competing line of outboard engines, PA63.[4] (The testimony further established that the recommendations of the district representative were almost invariably followed by the company. Mr. Schavina testified that every recommendation, without exception, made by him relating to the creation of new dealers or cancellation of existing dealers, was followed by the defendant.) Further evidence of similar practices by other Outboard Marine salesmen was presented or proffered. Thus, when plaintiff Amplex's franchise was cancelled, the local dealer it was given to (Nate Gates, located in Edgewater, Maryland, less than 10 miles away), was noted on a report filed by defendant's salesman with his home office as having indicated he would cease handling the Mercury engines within a year. OxEx 47, A148. Sixteen months later, he no longer sold Mercury engines. More evidence of this same type, including, for example,

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[4] A64-65. (This testimony was improperly excluded by the district court.) The written franchise agreements themselves contain no prohibition against "dual dealing" and, in fact, defendant Outboard, in an apparent effort to establish at least ostensible compliance with the 1956 Federal Trace Commission cease and desist order mentioned above, subsequently published and circulated to its dealers and salesmen a policy statement (Dx Ex. 8 & 9, A142) that no dealer would be terminated or otherwise discriminated against for handling competing engines. Canzona believed the potential sanctions of the FTC cease and desist order would be enough to deter the defendant from actually cancelling a dealership as large and valuable as his own, i.e., he believed defendant's salesman was bluffing when he threatened Amplex with cancellation unless it got rid of Mercury. Had he known defendant's salesman was not bluffing—that the company does not in fact feel deterred in this regard by the FTC order—he would have of course given up the less valuable Mercury line when ordered to do so.

threats of cancellation for "dual dealing" by defendant's salesmen in Philadelphia and in Falls, Oklahoma, was included in the proffer submitted to the district court, A98-117. Although unrebutted, all of this evidence was ignored by the district court, and the court of appeals erroneously concluded that the plaintiff had proved only a "single instance" of exclusive dealing, namely, its own cancellation, for refusing to adhere to such an agreement. The ultimate effect on Mercury and Scott in the Maryland area is that they have been excluded from any significant share of the local market and all outlets of any consequence are now controlled by the Defendant. PA116-117.

Evidence was also received or proffered to show the following. Outboard Marine is the largest manufacturer of outboard motors in the United States, its "Johnson," "Evinrude," and "Gale" brands accounting for approximately 60% of the national outboard motor market in 1961.[5] The rest of the market is shared by eleven (11) other manufacturers, the largest of which are believed to be the Kiekhaefer Corporation (now a part of Brunswick), maker of the "Mercury" outboard motor and the McCulloch Corporation, maker of the "Scott-Atwater" engine.[6] There were an estimated 12,000 to 15,000 marine dealers in the United States in

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[5] An estimated 343,000 outboard motors were sold in 1961, for a total retail dollar volume of $155 million. This represented a wholesale (manufacturer to dealer) sales volume of approximately $108.5 million, of which defendant accounted for $64,984,166 (in units 198,186 engines).

[6] No data is available here as to the relative market shares of these other firms, except the testimony of plaintiff's president that only the defendant's brands, plus the Mercury, the Scott, and the West Bend, were of any significance in the major marine market involved here, the Baltimore metropolitan area, and proffered evidence that the Scott is no longer an effective competitive force in the eastern market. (With the exception of possibly one other manufacturer (West Bend), the remaining eight competitors produced only specialty engines or offered engines with only a limited range of horsepower.)

1961; of these, approximately 8,700 (from 58% to 72%) were Outboard Marine dealers. And the overwhelming majority of those 8,700 dealers handled Outboard Marine engines exclusively, the only exceptions being those dealers that, owing to their peculiar geographic location and the like (*e.g.*, dealers in sparsely populated rural communities), could not be replaced at all and hence had to be tolerated in their "divided loyalties," as defendant's salesmen put it. These Outboard Marine dealers are invariably the largest and most influential in their respective communities. By excluding competing engines from the showrooms of these dealers, defendant's salesmen increase their own sales in their own various local territories and correspondingly decrease their competitors' sales. (The salesman's annual bonus is greatly dependent on his sales performance. Further, the salesman is subject to constant pressure by the defendant to increase sales.) As a former Outboard Marine salesman testified:

> THE COURT: I gather what you are saying is that if you could drive competing lines of merchandising out of the hands of dealers, then the ability to sell Johnson motors would thereby be increased.
>
> THE WITNESS: That is correct.[7]

A written report to the home office by one of its salesmen expressed the competitive impact of allowing dealers to handle more than one producer's engines this way: "He's been handling Merc (Mercury engines) on a direct basis, which I feel is substantially responsible for his nearly fifty percent decrease this year with us (Johnson). This boy should have gone at least seventy-five Johnsons this year."[8]

There is no question of fact as to why Outboard refused to renew the franchise of Amplex. Nor is there any issue of fact concerning the percentage of the market enjoyed by Outboard. The district court as well as the court of appeals accepted, for the purpose of rendering their decision, that Am-

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[7] A70.

[8] Dx 7. Tr. 290.

plex's franchise was terminated only because it began to sell Mercury and, further, that Outboard's market share was 60%.

REASONS FOR GRANTING THE WRIT

1. While the industry involved here is of modest size (the sale of outboard motors totalled, as noted, $155 million in 1961), the public interest in the issues involved is much larger. Exclusive dealing arrangements of this type are fairly common in large segments of the economy. Of the nation's approximately five (5) million business enterprises, some two (2) million are retailers. And a very substantial number of them—including, for example, approximately 200,000 gasoline service stations and more than 30,000 franchised automobile dealers[9]—deal exclusively or primarily the products of a single supplier, generally under some kind of franchise arrangement. The decision of the court of appeals in this case that a dominant manufacturer, one with 60% of its national market, one protected from effective actual and potential competition at its own manufacturing level by a barrier (product differentiation) that permits it to charge a substantially higher price than can be gotten by others for products of comparable quality, can lawfully cut off dealers who refuse to enter into exclusive dealing agreements, cannot help but adversely affect the whole climate in which this large and important segment of the country's small business community operates.

2. The injury that this defendant's exclusive dealing policy does to that part of the consuming public that buys outboard motors is substantial.[10] By systematically preventing

[9] Statistical Abstract of the United States 830 (1965) (1963 figures).

[10] The plaintiff does not press its contention, advanced below, that the exclusive dealing involved here is a *"per se"* antitrust offense. It concedes that proof of actual or probable injury to competition and to the public interest is a part of its burden, and believes that it has in fact carried that burden, particularly in its proffered evidence.

its competitors from getting their engines into the showrooms of a majority of the country's marine dealers (as noted, some 8,700 of the nation's 12,000 to 15,000 marine dealers are defendant's dealers, and virtually none of these—except for the few that are located in small rural communities—are allowed to handle competing engines), defendant Outboard Marine not only maintains its dominant market share (some 60% of all outboard motor sales) in the short run, but prevents those competitors from developing the kind of "consumer acceptance" that would be expected to make them effective competitors in the future. In economic terms, defendant's 60% market share is the result of a phenomena called "product differentiation," [11] a setting apart of a product in the minds of consumers in such a manner that it thereafter enjoys a price (or promotional cost) advantage over competing products—here, a conviction on the part of some 60% of the country's users of outboard motors that Outboard Marine's "Johnson" and "Evinrude" engines are "worth" a price that is some 15% higher than even defendant's own "Gale" engine, a motor that was in fact technically identical to its Johnsons and Evinrudes (the only differences being in their "hoods" or covers, and in their paint jobs).[12] That "product differentiation" advan-

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[11] See generally *Federal Trade Commission v. Procter & Gamble Company*, 386 U.S. 568; Joe S. Bain, *Barriers to New Competition* 114 (1956), and *Industrial Organization* 210 (1959).

[12] Tr. 346—Testimony of Robert Brosseau:

Q: Would you describe what technical differences, if any, there are between a Johnson and an Evinrude engine?

A: Between Johnson and Evinrude?

Q: Yes, sir.

A: None, sir.

Q: Between Johnson and Gale?

A: None, sir.

Q: Is there any difference at all between a Johnson and a Gale engine?

A: The shrouds and the paint job.

tage, in turn, is a creature of defendant's exclusive dealing policy. Outboard motors have all of the underlying characteristics that permit successful product differentiation.[13] They are relatively durable, expensive items, purchased at relatively infrequent intervals (although defendant is having considerable success in introducing the "annual model change" to outboard motorists). They are also mechanically complex pieces of machinery that the average user finds extremely difficult to evaluate accurately, a factor that tends to produce heavy reliance on the "reputation" of the manufacturers of the equipment and their dealers. This complex machinery also requires frequent repair work and servicing, another factor that tends to differentiate the product of the manufacturer with the superior dealers. Finally, there are obviously "conspicuous consumption" motives involved in the purchase of outboard motors, as evidenced by defendant's success, already mentioned, in selling the outboard motorist on the idea of the "annual model change." The most "popular" engine, the one displayed in the largest number of dealer showrooms, particularly the one displayed in the showrooms of the biggest and "best" dealers, thus tends to perpetuate its aura of superiority in the minds of the consuming public.

This "product differentiation" barrier that permits Outboard Marine to charge its dealers some 15% more for Johnson and Evinrude engines than for the technically identical Gale engine could not be maintained without the exclusive dealing arrangements it has with its some 8,700 dealers. There is no serious dispute here that this exclusive dealing policy has the straight-forward effect of enhancing the sales volume (and market share) of the defendant and shrinking

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. Q: Excuse me?

A: The shrouds, which would be the hood cover or the engine cover itself, called the shroud, and the paint job, and that's about it.

[13] See generally Bain, note 11, *supra*.

that of its competitors. If a Johnson dealer takes on Mercury engines as a second line, his sale of Mercury engines increases and his sale of Johnson engines falls.[14] Repeated across the nation, this would mean a sharp re-aligning of market shares in the industry. If this plaintiff and the defendant's other 8,700 marine dealers throughout the country were permitted to display competing engines—the Mercury, the Scott, the West Bend, and others—in their larger, more attractive, higher-traffic showrooms, defendant's "product differentiation" advantage and its present 60% share of the national market in outboard motors would obviously start to dwindle and that of its competitors (both individually and collectively) would correspondingly start to increase. With their fixed costs spread over larger volumes of production and distribution, per-unit costs of those competing manufacturers would be expected to fall and, with more nearly equal market shares among the industry's 12 already established manufacturers in 1961,[15] plus potential entry by newcomers that could be expected to find the industry more attractive in this improved climate, the vigor of competition at the manufacturing level should be enhanced. Lower costs and enhanced competition would be expected to lower the price from the manufacturer to the dealer, eventually eliminating most, if not all, of the 15% "premium" price defendant is now able to charge for the Johnson and Evinrude brands. Competition should also be enhanced at the dealer level, thus assuring the passing on to the consumer of those lower manufacturing costs and prices. Thus a 15% reduction in the price of the average outboard motor ($458, in 1961) would be approximately $69 per engine, or a total saving to the American consumer of some $23 million on the $155 million "worth" of outboard motors bought by the consuming public in 1961.

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[14] See e.g. notes 7 and 8, *supra*.

[15] As previously noted, only two or three of these eleven competitors carried a full horsepower line of engines.

The defendant Outboard Marine understands all of this only too well; it has no desire to take the "supermarket test," to see if its engines can still command a "premium" price, and continue to hold 60% of the national market, if they were displayed alongside the motors of its competitors, in the same dealer showrooms across the country, by dealers that would no longer have an incentive to exaggerate their merits to consumers at the expense of competing engines, and thus subject them to meaningful price and quality comparisons by a better-informed consuming public.[16]

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[16]This defendant's concern with preventing consumers from "shopping"—from attempting to get a better bargain—is illustrated by the argument of defendant's counsel to the district court that a dealer's handling of more than one line of competing merchandise "creates confusion in the mind of the customer. If the customer sees two products, he may not be able to decide between them and he may walk out without buying anything." Tr. 32. This is of course economic nonsense; supermarkets carry some 9,000 separate items on their shelves, often as many as a dozen directly competing brands of the same product. Indeed, the "supermarket principle" is at the core of this case: the plaintiff believes that outboard motors, being no longer a "luxury" item for the wealthy but a product purchased by a much broader spectrum of the public today (the largest single category of purchasers is the skilled worker, who bought 28% of all outboard motors sold in 1961), should be merchandised accordingly, with large showrooms, mass displays and the like, whereas defendant clings to the concept of the single-line "specialty" store. Thus, when defendant's salesman confronted plaintiff's president, Canzona, in his place of business on July 20, 1961, and gave him the ultimatum of giving up the competing Mercury engine or losing his Johnson franchise, Canzona tried to explain "that department stores, that automobile showrooms, more enlightened industries, perhaps (now) tended to group their stores together in shopping areas in order to attract more traffic for everyone. He did not accept these arguments. . ." Tr. 141-142.

3. While defendant's ability to charge a monopoly price over a long period of years[17] is the most direct and obvious proof of its possession and exercise of monopoly power, similar proof is inherent in its successful exclusion of competing manufacturers from the major retail outlets. The kind of exclusive dealing involved here would be impossible in a competitively-structured industry, i.e., one with only moderate degrees of market concentration, product differentiation, and barriers to entry.[18] The very essence of effective competition is the availability of acceptable "substitutes" (from competing firms) for the alleged monopoly product,

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[17]In the ten year period 1952-1961, the defendant Outboard Marine Corporation had net (after tax) earnings ranging from a "low" of 12.4% on stockholders' equity (excluding the recession year, 1961, when "only" 5.5% was earned) to a high of 27.3% in 1955. Outboard Marine *Annual Report* 18-19 (1961). Px Ex 76 Tr. 628. The ten year *average* was 17.4%, a monopoly return by any standard. "[F]or the private sector of the economy the range of 5 to 6 per cent would seem about appropriate. This, then, is the opportunity cost of equity capital, the minimum normal rate of profit, based on what it could earn in other uses." Caves, *American Industry: Structure, Conduct, Performance* 103 (1964). See also Kaysen and Turner, *Antitrust Policy* 63 (1959): "If normal profits are of the magnitude of say, 6 to 8 per cent on invested capital, an average profit rate of 9 percent over ten years could not be identified as supernormal with any confidence, but one of 12 percent should." In dollars, this defendant's net (after tax) profits have totalled $84 million in that ten year period, or some $8.4 million per year. At a competitive rate of return (e.g., 8%) rather than the 17.4% it has in fact averaged, its aggregate dollar earnings over that period would have been just under half that total, some $40 million (or $4 million per year). Therefore, even ignoring the inflated costs that monopoly generally produces and doubtless has produced here as well (e.g., the small scale production and inefficient dealer-distribution systems defendant has imposed on the industry), at least $4 million per year in monopoly profits are readily identifiable here, money wrongfully extracted from the dealers in the first instance and, ultimately, from the consuming public.

[18]See generally Bain, note 11, *supra*.

other products serving the same needs and wants that the consuming public can and will turn to if the price of the product in question is raised above a competitive level. Here there are no effective substitutes, as far as the buying public is concerned, for the "Johnson" and "Evinrude" brands of outboard motors sold by this defendant, Outboard Marine. As the facts of this case so vividly illustrate, the dealer confronted with the choice of giving up his Johnson or Evinrude franchise, on the one hand, and whatever "second line" or lines he may be handling, on the other, in fact has no economically meaningful choice to make: the vast majority of purchasers of outboard motors do not regard those competing engines as satisfactory "substitutes" for the defendant's two "premium" brands and will therefore transfer their patronage to some other dealer if he ceases to handle them.[19] Thus it is this absence of effective substitutes—of competing brands of outboard motors that consumers are willing to accept on equally favorable terms (price and volume) to the dealer—that makes possible this defendant's exclusive dealing policy. If there were such effective substitutes—if, for example, none of the 12 manufacturers in this industry commanded more than a proportionate share of consumer attachments (*e.g.*, 8% of the market)—coercion of the dealers would be impossible; confronted with the choice of giving up 11 other brands (some 92% of his sales) or that of the manufacturer that tried to insist on "exclusive dealing," the dealer would of course unhesitatingly give up the latter's brand. Here, it is Outboard Marine's power over the consumers' minds—its power to take away at least 60% of a dealer's business by transferring its name from his door to

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[19] Thus it was proffered that a Mr. George Etzel of Baltimore, a consumer witness (Mr. Etzel is a successful insurance broker), would testify if called that he had formerly been a customer of the Plaintiff but that "he would never again purchase an outboard motor from Amplex because he would not buy any engine other than a Johnson." A107.

another dealer's door—that shows the presence and the exercise of monopoly power.[20]

It is this factor that suggests the economically appropriate standard for evaluating exclusive dealing programs. Where an industry is competitively structured—where there are substantial numbers of competitors, offering products of reasonably comparable acceptability to consumer, with reasonably easy entry—an exclusive dealing policy by one of those relatively small firms would probably have little or no adverse effect on competition at either the manufacturing or distributing levels. Dealers would still have numerous alternatives to turn to for equally saleable supplies; other manufac-

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[20]There was also uncontradicted testimony that the retail sale of other marine products and accessories to consumers—boats, trailers, and the like—are "tied" to the sale of motors, that a marine dealer's overall sales volume in all of these products is dependent in large measure on the kind of outboard motors he sells. A "Johnson" or "Evinrude" franchise generates a large volume of consumer traffic for a dealer's store and thus promotes the sale of those other products as well. Accordingly, manufacturers of those other products—particularly the manufacturers of the more popular brand boats—prefer to have them sold by "Johnson" and "Evinrude" dealers. With overall sales volume tied to the brand of motor handled by a dealer, the loss of a "Johnson" or "Evinrude" franchise thus impairs not just his sales and profits on the engines themselves but on his entire business. (In 1961, Amplex purchased $85,458 worth of engines. Its gross sales were $415,000.00.) In fact, there is uncontradicted testimony that the loss of a "Johnson" or "Evinrude" franchise typically results in business failure for a dealer. The large sales volume (in both engines and other products) generated by the enormous public acceptance of those brands inevitably creates large fixed or overhead costs that cannot be readily contracted when the franchise is withdrawn and sales volume starts to dwindle. And of course no competing engine can generate the kind of sales volume required to support an establishment of the kind and size typically developed by the successful "Johnson" or "Evinrude" dealer. The result, as here, is almost always virtual business failure.

turers, though barred from one relatively small dealer's showroom in each community, would still have access to numerous other outlets of equal size and efficiency in that area.[21] Exclusive dealing, being harmful to competition only when it springs from an industry that is not competitively structured, should thus be evaluated on the basis of whether the industry that practices it is or is not so structured.[22]

4. Exclusive dealing having been used in this case to effect and preserve a virtual monopoly—a 60% share[23] of a

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[21] This presupposes, of course, a community of sufficient size and density to support several dealers of efficient size in competition with each other. In smaller communities, particularly those too small to support more than a single dealer, an exclusive dealing policy (which necessarily includes a refusal to sell to the department stores and other such mass marketers) virtually bars all but the single most "popular" brand from any representation at all in that area. (Use of less-than-optimum size dealers implies higher per-unit marketing costs and thus an equivalent lessening of capacity to offer effective competition to the most popular brand.)

[22] See generally Brodley "Oligopoly Power Under the Sherman and Clayton Acts—From Economic Theory to Legal Policy," 19 *Stanford Law Review* 285 (January 1967).

[23] Recent economic studies show that monopoly power—the power to exclude competitors or to set noncompetitive prices—begins at a much lower range than the "sixty or sixty-four percent" market share considered "doubtful" in Judge Hand's famous dicta in *United States v. Aluminum Co. of America et al.*, 148 F.2d 416. Thus it was recently found that the profits of food manufacturers tended to be approximately twice as high in industries where the four largest firms held 50% to 65% of the total industry sales as they were in those where the four largest firms had from 35% to 50%. (Where the four largest had 75% or more, average profits rates are higher still—some three times as high as those in the relatively unconcentrated industries.) *Structure of Food Manufacturing*, Technical Study No. 8, National Commission on Food Marketing, 202-207, (1966). As was said in that report: "It appears that profits are particularly sensitive to concentration at levels where four firms account for around 50%.... *Four firm concentration in the immediate range of 50% appears to be*

national market, with the power to exclude competitors from some 58% to 72% of all marine dealer outlets in the country, and the power to charge consumers a monopoly price, one that exceeds a competitive level by perhaps as much as 15%—the economic significance of the case seems well established. And since these plainly undesirable economic results have been achieved by a practice that is fairly widespread in American industry—exclusive dealing—the importance of the legal principles applied here would seem to be equally clear. Certainly the practice is not illegal *per se;* as discussed above, exclusive dealing by a firm with a relatively modest market share (e.g., 5% to 10%) in a competitively structured industry, would be unlikely to have adverse effects on competition at any marketing level and hence would not be unlawful.[24] But where, as here, the injury to the competitive process and to the public interest in competitive prices is so plain, the practice should be condemned under an economically sound application of the "rule of reason," a rule that looks not to form but to substance and condemns those practices that have those socially harmful effects, regardless of how they may be legally clothed. Here, even the forms are satisfied. Monopolization under Section

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a critical degree above which profits are significantly higher and below which they are significantly lower." Id., at 205 (emphasis added). If the power to set noncompetitive prices is significantly present when four firms together control 50% of a market, then *a fortiori* such effects are to be expected when that share is in the hands of a single firm. This conclusion is of course consistent with this Court's holding in *United States v. Philadelphia National Bank,* 374 U.S. 321, 364, that a merger producing a single-firm market share of 30% presents a clear threat of "undue concentration," and the views of the prominent economists mentioned there (374 U.S. at 364, n. 41) that single-firm market shares in the still lower range of 20% to 25% might more realistically mark the point at which undue concentration—significant degrees of monopoly market power—can reasonably be expected.

[24] Plaintiff's counsel, being unfamiliar with antitrust matters, incorrectly argued for a *per se* rule in the courts below; that position is abandoned here.

2 of the Sherman Act is established by the showing that the defendant has both acquired and exercised the power to fix noncompetitive prices and exclude competitors from effective access to the various dealer markets. *United States v. Griffith*, 334 U.S. 100; *American Tobacco Company v. United States*, 327 U.S. 781. Contracts or combinations to restrain trade (*e.g.*, exclude competitors) in violation of Section 1 of the Sherman Act are inherent in defendant's oral understandings with the majority of its 8,700 dealers that they will keep competing outboard motors out of their showrooms (or "phase out" any already on hand); the fact that such oral agreements or understandings exist is established not merely by the handful of cancellations and "phase out" arrangements this plaintiff's meager resources enabled it to prove, but by the reasonable inference that the cancellation of the few that *do* refuse to adhere to such an agreement means that the others, those that have not been cancelled, have *not* so refused and thus are in fact operating under such an express or implied oral agreement. *A. C. Becken v. Gemex Corporation*, 272 F.2d 1 (1959). These same facts also show an unlawful "condition, agreement or understanding" under Section 3 of the Clayton Act.[25] And the possession and exercise of monopoly power (exclusion of competitors or the fixing of a noncompetitive price) that violates Section 2 of the Sherman Act is more than sufficient to show the substantial lessening of competition or tendency to monopoly required under Section 3 of the Clayton Act. *Standard Oil Company of California (Standard Stations) v. United States*, 337 U.S. 293; *Osborn v. Sinclair*, 287 F.2d 832 (4th Cir., 1960) and 324 F.2d 566 (4th Cir., 1963).

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[25]Plaintiff did not invoke this statutory provision below, relying on Sections 1 and 2 of the Sherman Act. However, the court of appeals concluded that Section 3 of the Clayton Act "approaches Plaintiff's grievance more closely than does the statute pleaded," A-7, and plaintiff, being more familiar with the statutes involved at this stage, will take the appropriate steps to amend its complaint to conform to the proof if this Court's disposition of the case permits.

The rulings of the district court and the court of appeals in the instant case is most markedly at odds with this Court's landmark decision on exclusive dealing, the *Standard Stations* case, *supra*. There *Standard Oil* had entered into exclusive dealing contracts with some 6,000 service station operators (16% of the stations in the relevant 7-state market) having annual gasoline sales of $60 million (14% of the gasoline sold at retail in the area). Here, by way of contrast, some 8,700 marine dealers with sales of more than $100 million "worth" of defendant's outboard motors are operating under similar exclusive dealing arrangements. And they account for 58% to 72% of all such retail outlets and some 60% of all sales volume in outboard motors in the nation.

The rulings of the courts below in this case are also inconsistent with the principles established by this Court in the analogous "vertical integration" merger cases, particularly *Brown Shoe Co. v. United States*, 370 U.S. 294. One of the questions involved in that case was whether competition in the manufacture of shoes would probably be lessened by Brown's acquisition of the several hundred retail stores operated by the acquired firm (Kinney), representing less than 2% of the retail shoe stores in the country. The answer of this Court was in the affirmative, that competition would probably be injured by that foreclosure. Here, the foreclosure of 58% to 70% of all marine dealers to competing manufacturers is accomplished by contract, rather than by merger, and hence is ostensibly less "permanent" than the outright ownership of vertical acquisition. The reality, however, is the same; except for those marine dealers that are terminated for dealing in competing engines or for poor performance, defendant's dealers generally remain tied to it for their entire business life. Hence the competitive effects are substantially the same as they would have been if Outboard had bought outright these 8,700 dealers (and continued to buy up any other promising ones that might appear in the future).

The ruling of the court of appeals in the instant case is also, the plaintiff believes, in conflict with its own decision

in *Osborn v. Sinclair, supra.* And it is certainly in conflict with the principle announced by the Seventh Circuit in *A. C. Becken v. Gemex Corporation, supra:*

> "In the case at bar, the clearly established facts show a plan of operation adopted by the defendant, the essential purpose of which was to limit the sale of its products to wholesalers who would agree not to sell below prices stipulated by defendant. Such an agreement is in violation of Section 1 of the Sherman Act. The established facts also show that the refusal to continue plaintiff as a wholesaler of defendant's products was solely because plaintiff would not sell those products according to defendant's existing illegal plan of doing business in violation of Section 1. Plaintiff was not rejected as a customer by defendant because of any other reasons."

Similarly, in the instant case, by the express finding of the court of appeals itself, plaintiff Amplex was cancelled as an Outboard Marine dealer solely because it refused to stop selling a competing product. It was not rejected as a customer for any other reason, and the court of appeals so acknowledges.

The error of the court of appeals here, plaintiff believes, lies primarily in its failure to appreciate the economic significance of this defendant's 60% market share, its power to exclude competitors and fix noncompetitive prices. Failing to understand that to possess monopoly power is to exercise it—that, of necessity, a monopolist can charge only one price, and that whatever price it chooses must by definition be a monopoly price (and always above a competitive price, unless the monopolist is irrational or a philanthropist), that "the power and its exercise must needs coalesce," *United States v. Alcoa,* 148 F.2d 416 (2d Cir. 1945)—the court failed to recognize that this defendant, as a monopolist, has no claim to any of the benefits that firms in more competitively structured industries might be able to claim under *United States v. Colgate*, 250 U.S. 300. "*In the absence of any purpose to create or maintain a monopoly,* the (Sher-

man) act does not restrict the long recognized right of a trader or manufacturer . . . freely to exercise his own independent discretion as to parties with whom he will deal . . ." (Emphasis added). This defendant fails that first test; it exercises monopoly power on a day-to-day working basis and hence has no right to refuse to deal for the purpose and with the effect of preserving that monopoly power.

6. A significant procedural question is presented here. After hearing five (5) of plaintiff's witnesses, the district court intimated that it was about to dismiss the case and required plaintiff to present the rest of its evidence, including the testimony of forty-two (42) witnesses still to be called, in the form of an offer of proof. This was done. The district court then dismissed the case, rendering its opinion (including "findings") orally from the bench. While the district court specifically acknowledged that it was employing "summary procedures" (which it also acknowledged are to be "most sparingly" used in antitrust cases), A21, and stated no less than eight (8) times in the course of its opinion that it was accepting as proven and true *all* of the plaintiff's uncontradicted evidence, including *all* of its proffer, and was according plaintiff *all* favorable inferences reasonably to be drawn therefrom, the court actually accorded no weight at all to the bulk of that proffered evidence (nor to other uncontradicted evidence as well); the most crucial of the court's conclusions as to the facts—e.g., that only a "single instance" of exclusive dealing had been shown—are wholly inconsistent with that proffered testimony.

Instead of going to the question of whether the district court's fragmentary factual conclusions were "clearly erroneous"—as they patently are—the court of appeals held that the dismissal had not been a "summary procedure" after all, but a trial on the merits in which the district court, as the "unfettered" trier of the facts, was not required to accept that proffered evidence as true, and to accord plaintiff all favorable inferences to be drawn therefrom, but was free to "weigh" and reject it "just as a jury would." A-2.

Aside from the fact that not even a jury is so entirely "unfettered" that it can "arbitrarily or capriciously" disregard "the positive testimony of a disinterested, uncontradicted witness," *Jerke v. Delmont State Bank*, 54 S.D. 446, 223 N.W. 585, quoted 9 *Moore's Federal Practice* Sec. 2495 (3rd ed., 1940), at 309, the reality here is that the district court's ruling in no way involved a "weighing" of plaintiff's evidence, an evaluation of it as to how much was true, how much untrue, or how much was inherently improbable or otherwise deserving of less than full "weight." Rather, the district court, having no appreciation of the economic and legal significance of defendant's 60% market share and thus of the facts recited in the plaintiff's proffer, simply regarded them as largely irrelevant. No serious evaluation of plaintiff's evidence was made by the district court, because it thought that evidence legally insufficient to establish a violation under *any* principle of antitrust law; no serious consideration was given to plaintiff's evidence by the court of appeals, because it erroneously thought the district court had done the "weighing" job the latter expressly conceded it had not done by saying it accepted all of the plaintiff's proffered and uncontradicted evidence. The court of appeals has thus erred, plaintiff believes, in failing to hold that the district court honored in the breach rather than the observance this Court's policy that "summary procedures should be used sparingly in complex antitrust litigation," *Poller v. Columbia Broadcasting Co.*, 368 U.S. 464, ; *Continental Ore Co. v. Union Carbide and Carbon Corp.*, 370 U.S. 690, making findings that were clearly erroneous, and applying an erroneous rule of law to them in summarily dismissing this case.

7. We speak of justice last not because we think it belongs here but because we know this Court hears its cry in more cases than it can possibly heed. The founder of this plaintiff's business, Mr. Nicholas Canzona, is an exceptional man in a number of respects. He holds a degree in chemistry from Johns Hopkins University. He has taught for many years, and continues to teach from time to time, at the United States Naval Academy at Annapolis, his courses in-

cluding English literature, government, economics, European history, and naval history and strategy. He is a Lt. Col. in the Marine Corps, a highly decorated Korean War veteran, and co-author of three (3) books on United States military operations in Korea, these being the official history of Marine Corps participation in Korea. He and his friends, many of them still in the Marine Corps,[26] poured their life's savings into the building of this relatively small retail business. They physically built, with their own hands, their first store and showroom. They employed the latest, most modern techniques in merchandising, including television advertising, the use of a public relations firm, and the concept of the supermarket." Through hard work and intelligent planning, they became the largest marine dealer in the State of Maryland, exceeding Outboard Marine's second largest Maryland dealer by some 40% in 1961. After five (5) years of labor and sacrifice, they had developed their original investment into a very valuable business establishment, one with a net worth of some $100,000, one that returned a net profit of some $21,000 in 1960. Then, on the word of a lowly salesman, a petty tyrant intoxicated with his power to ruin better men than himself, they were wiped out. They did nothing to deserve to be wiped out. They made no business mistakes. They did no wrong. All they did was offend a monopolist, by daring to sell a competing product. We do not have to tell this Court that this is wrong; we do ask, however, for an opportunity to tell the Court that it is not the law, that exclusive dealing is lawful only when engaged in by a competitive firm, in a competitively-structured industry.

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[26] Canzona himself is back in the Marine Corps at the present time, having lost the business he worked so hard to create, his life savings and much of the savings of forty of his friends who invested in this business.

CONCLUSION

For the reasons stated, we respectfully submit that the petition for a writ of certiorari should be granted.

David Freishtat
Paul D. Scanlon
Harold Buchman
Attorneys for Petitioners

September 1967.

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 10,671.

Amplex of Maryland, Inc.,
Appellant,

versus

Outboard Marine Corporation,
Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND, AT BALTIMORE. HARRISON L. WINTER, DISTRICT JUDGE.

(Argued February 8, 1967. Decided June 1, 1967.)

Before SOBELOFF, BOREMAN and BRYAN, Circuit Judges.

David Freishtat for Appellant, and Roberts B. Owen (Nestor S. Foley and Michael P. Bentzen; and Covington & Burling on brief) for Appellee.

ALBERT V. BRYAN, Circuit Judge:

In this antitrust action under § 4 of the Clayton Act, 15 USC 15, Amplex of Maryland, Inc. claimed damages from Outboard Marine Corporation for violating §§ 1 and 2 of the Sherman Act, 15 USC 1 and 2, during 1961 in the sale of outboard motors and related items.[1] The alleged unlawful conduct was the refusal to deal with Amplex as a franchiser so long as it also sold similar products of manufacturers other than Outboard. The complaint charged the breaches were committed by Outboard's engaging "in a combination and conspiracy to restrain interstate trade and commerce and . . . combining and conspiring to monopolize, attempting to monopolize and monopolizing interstate trade and commerce". The District Court dismissed the complaint for failure of proof, and we sustain this judgment.

At the start, it is necessary to understand the order of procedure in the trial court. By agreement trial of the two issues of liability and damages were separated. "The first issue—whether the plaintiff has been 'injured in its business or property by reason of anything forbidden in the antitrust laws'—shall under such agreement be tried first to the Court sitting without a jury (such trial being hereinafter referred to as 'the liability trial')".

Thus the judge became the unfettered trier of the fact. He was entitled to weigh the evidence just as would a jury. The submission was not analogous to a presentation on motions to dismiss, for summary judgment or for a directed

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[1] "§ 1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal . . . .

"§ 2. Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor . . . ."

verdict. Hence the Court was not required to view the evidence as it must on motions.

This understanding is important because the appellant refers to the issues as tendered by a motion for summary judgment. Moreover, at times the Court speaks of its willingness to accord favorable inferences to certain parts of the evidence for the plaintiff. Later, it adverts to the summary nature of the disposition of the case. The advertence, however, is to the procedure adopted by the Court, with the acquiescence of the parties, to shorten the trial, rather than to the character of the hearing. After more than four days of testimony, the judge suggested that procedure: that the remainder of the plaintiff's evidence be stated in a proffer. In this the Court would consider the evidence actually adduced and that proffered before taking the later in actual testimony. Under the agreement, upon completion of the plaintiff's proof in this method, the Court declared it insufficient to warrant a recovery.

The findings of fact derived from the proof, with conclusions of law thereon, were stated by the judge from the bench and reported. They were detailed and altogether comprehensive. We think this an adequate compliance with Rule 52(a) Federal Rules of Civil Procedure allowing "an opinion or memorandum of decision" to be filed in lieu of a formal statement of fact findings and legal conclusions.

The facts here, taken from the Court's findings and undisputed circumstances, are these.

1. Plaintiff Amplex since before 1960 operated at Arnold, Maryland, on north Chesapeake Bay, a marine store.

2. In the spring of 1958 it commenced buying Scott-Atwater outboard motors for retail; but Amplex was very desirous to obtain a license to sell the more popular Johnson motors.

Defendant Outboard, a Delaware corporation, was the manufacturer of the Johnson, Evinrude and a model known as the Gale; it had factories and offices in Wisconsin and Illinois as well as other places; as pertinent here, Outboard did business in three divisions, Johnson Motors in Waukegan, Evinrude Motors in Milwaukee and Gale Products Division; the Johnson and Evinrude are similarly priced but the Gale was produced for resale by general stores, under their brand names and at a price lower than the other two; Gale was not manufactured after 1963.

3. In 1957 the Johnson Division promulgated to its sales representatives a statement of policy in respect to the awarding or maintaining of dealerships; relevant here is the instruction that no dealer in Johnson motors should be refused, or any dealership cancelled, because the dealer desired to undertake a competing line of engines; and this policy was subsistent throughout the times of this case.

4. About April 1960 the Johnson Division granted a dealership to Amplex, which commenced the sale of Johnson motors in May; it was evidenced by a written agreement expiring on September 30, 1960 or upon 30 days notice by either party; it contained no provision for renewal and no prohibition upon Amplex's sale of other models.

5. The Johnson Division was aware that Amplex was selling the Scott-Atwater engine under a franchise with its producer; to meet business expansion due to the Johnson dealership, Amplex enlarged its sales facilities at considerable expense.

6. The Outboard motors had a national market in the United States and in Canada; according to its publications, Outboard manufactured and sold more than half, almost 60%, of the total motors sold in the United States and

Canada; from the same source it appears that there were only about 11 other manufacturers in the United States; two of these were Mercury and Scott-Atwater; this was the state of the market in 1960 and 1961; Outboard's sales market in the United States is divided into territories, each in charge of a district representative who supervises the dealer accounts, receives factory orders and recommends the award, refusal or termination of franchises.

7. Upon expiration of the Amplex dealership on September 30, 1960, it was given a new one for the year next ensuing; this again was with the knowledge that Amplex was also selling the Scott-Atwater engines; no renewal provision was embodied in the second agreement, nor was there any prohibition upon the franchiser holding a dealership for another engine.

8. In June 1961 Amplex established a separate business in a small building across the highway from its principal location; it was stocked by the manufacturer of Mercury outboard motors; Amplex operated it under the name of Arundel Marine; in early July the district sales representative of Outboard by telephone and by a personal visit inquired about, and protested, the dealership of Amplex with Mercury.

9. Later, in August or September 1961, this representative advised Amplex that Outboard would not renew its dealership because of Amplex's agency for Mercury; upon termination on September 30, 1961 the Outboard-Amplex dealership was not continued; shortly the same dealership was awarded to Nat Gates and Sons, a similar store not far away, at Edgewater, Maryland; Gates was then selling Mercury engines and continued to do sc until it relinquished the Mercury agency several years afterwards.

10. The reasons given by Outboard for its refusal to extend the Amplex dealership were the squalor and poor organization of Amplex's pace of operation, its failure to give adequate dealer service to purchasers and its poor accounting system.

11. Plaintiff's evidence, adduced and proffered, showed but one refusal by Outboard to deal upon a dealer's failure to drop a competitive line; that was the cancellation, or nonrenewal, of plaintiff's own franchise; there was no evidence that the disenfranchisement of Amplex was held out threateningly as a deterrent to other dealers; there was no evidence of any combination or conspiracy linking Outboard to its competitors or other dealers.

12. Plaintiff's evidence, adduced and proffered, did not disclose any monopolistic position of Outboard, or any attempt, intent or probability of success of any attempt, to monopolize.

I. Plaintiff asserts only the Sherman Act, and if we measured the defendant's conduct by that standard alone dismissal would quickly follow. No combination necessary to a section one prosecution was suggested by the evidence. Fatal to the section two charge was the lack of any evidence of monopolization or its attempt. Even were monopoly power —the ability to fix prices or to exclude competition—inferable from Outboard's manufacture and sale of nearly 60% of the motors of this kind, the proof utterly fails to establish the slightest endeavor to use it. In brief, no violation of the Sherman Act is present.

II. But we choose not to rest on the Sherman Act alone. Although the plaintiff does not invoke § 3 of the Clayton

Act, 15-USC 14[2], it approaches the plaintiff's grievance more closely than does the statute pleaded. As it offers a much broader protection, we now look to it to demonstrate the want of substance in the plaintiff's case under any federal law.

The plaintiff contends, and we paraphrase the Clayton Act § 3, that actually the franchise is an "understanding", "the effect" of which is "to substantially lessen competition or tend to create a monopoly" in outboard motors. But the proof shows no more than a unilateral refusal to sell. Without more, a declination of this kind is not unlawful. This court, on facts not unlike those here, so declared in McElhenny Co. v. Western Auto Supply Co., 269 F2d 332 (4 Cir. 1959). For us Chief Judge Sobeloff stated the proposition altogether clearly, as follows:

> "Generally speaking, the right of customer selection is sanctioned by both statute and case law. Absent conspiracy or monopolization, a seller engaged in a private business may normally refuse to deal with a buyer for any reason or with no reason whatever. Thus, the courts have until now not held a seller liable in damages for refusing to deal with one who is unwilling to enter into

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[2] "It shall be unlawful for any person engaged in commerce, in the course of such commerce, to lease or make a sale or contract for sale of goods, wares, merchandise, machinery, supplies, or other commodities, whether patented or unpatented, for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, or fix a price charged therefor, or discount from, or rebate upon, such price, on the condition, agreement, or understanding that the lessee or purchaser thereof shall not use or deal in the goods, wares, merchandise, machinery, supplies or other commodities of a competitor or competitors of the lessor or seller, where the effect of such lease, sale, or contract for sale or such condtion, agreement, or understanding may be to substantially lessen competition or tend to create a monopoly in any line of commerce."

an unlawful vertical price agreement or an exclusive dealing arrangement. Clothed with this privilege the seller not only may, but ordinary fairness would require that he should announce in advance the circumstances under which he will do business with others.

"This is not to say however that the course of dealing between seller and buyer may not go beyond mere customer selection and the independent announcement of policy and ripen into an implied or informal agreement or understanding . . . .

. . . . . .

"Neither in terms nor inferentially does the statute [Clayton Act § 3] prohibit a unilateral refusal to sell. Its condemnations are directed against executed transactions of lease, sale or contract containing the forbidden condition, agreement or understanding. Quite correctly the District Court pointed out that a mere refusal by a manufacturer to deal with a retailer who will not confine his dealings to the goods of the manufacturer does not run afoul of the section. The cases are unanimous in this . . . [Citations omitted]." 269 F2d at 337-38.

This proposition has survived constantly without modification since United States v. Colgate and Company, 250 US 300 (1919). See 51 Va. Law Review 687 (1965). Shortly after *McElhenny,* it was again recognized in United States v. Parke, Davis & Co., 362 US 29 (1960), notwithstanding the Court there held that added circumstances of monopolistic, joint or concurring action put the controversy beyond the *Colgate* doctrine.

No such additional circumstance is now present. That its absence destroys the actionability of a refusal to deal was

emphasized in Osborn v. Sinclair Refining Co., 286 F2d 832, 839 (4 Cir. 1960), cert den. 366 US 963, where we said, again by Judge Sobeloff:

> "Even where a manufacturer or supplier has a policy aimed at a result which, if accomplished through an agreement or combination would amount to an unreasonable per se restraint of trade, he nevertheless may, in the absence of such agreement or combination, refuse to deal with a purchaser in accordance with the announced policy. . . ."

Furthermore, contrary to the plaintiff's insistence, we see no resemblance here to a tying arrangement. Cf. Osborn v. Sinclair Refining Co., 324 F2d 566 (4 Cir. 1963). In short, we see nothing unlawful.[3]

We may well conclude this case by quoting the conclusion of the Court in Tampa Electric Co. v. Nashville Coal Co., 365 US 320, 335 (1961):

> "We need not discuss the respondents' further contention that the contract also violates § 1 and § 2 of the Sherman Act, for if it does not fall within the broader proscription of § 3 of the Clayton Act it follows that it is not forbidden by those of the former. [Citation omitted.]"

The District Court's dismissal of the complaint will not be overturned.

Affirmed.

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[3] The plaintiff alleged, but offered no competent proof, that the defendant had entered into "agreements" or "understandings" with dealers to "phase out" the handling of competing products. For that reason we have no occasion to discuss the question of liability, if any, on that score.

RULING FROM THE BENCH

[843] THE COURT: Good afternoon, gentlemen.

Gentlemen, I have been considering your arguments and your briefs also since I recessed this morning, and I have come to some definite conclusions on all aspects of the case except one.

On one aspect of the case, I am going to ask you if you could repeat or perhaps elaborate a bit more on what you argued to me, but I think it only fair before doing that to tell you that much which I consider that I have decided and what my conclusions are and the reasons for the conclusions.

I begin by saying that as I grasp the argument of the plaintiff, both in opening statement and more particularly in what we have been going through today, and as I view the evidence which has been proved in the first five days of hearings, and accepting as proved the evidence which has been proffered this morning, that there are four possible theories on which the plaintiff seeks to recover here.

One of these theories arises under Section 1 of the Act and the other three arise under Section 2 of the Act.

Under Section 1 of the Act, the theory is that there was a conspiracy to create an unreasonable restraint of trade or commerce.

[844] Accepting everything which the plaintiff has proved and proffered in the light most favorable to the plaintiff, I am of the view that the plaintiff can prove no case under this theory because I am of the view that there is no admissible proof of any conspiracy, let alone whether the consequences of the conspiracy would be to create an unreasonable restraint of trade or commerce.

The only evidence that is offered is a species of hearsay evidence, namely, that x would say that Smith had said that Smith went to the home office of the defendant to talk to the defendant about eliminating the

plaintiff as a franchised Johnson dealer, and even this evidence is without any direct proof of whether the defendant proceeded on that basis or proceeded for other reasons not to renew the plaintiff's franchise.

Now, it seems to me if this evidence were to come in, this hearsay evidence to which I have referred, that by reason of the sequence of events, I might be able to infer that this is the reason why the defendant permitted the plaintiff's franchise to expire and affirmatively elected not to renew it, but I think that the point is that the evidence does not constitute any direct evidence or circumstantial evidence of a conspiracy. It is at most, as I termed it before, a species of hearsay evidence.

Once a conspiracy has been proved, I think that [845] hearsay evidence in the form of admissions can be used, that is to say, an admission by a co-conspirator can be attributed to the defendant if the fact admitted was something in furtherance of the conspiracy, but I am not aware of how you can prove the fact of the conspiracy by the hearsay which would be admissible, under the rules of evidence as I understand them, only if the conspiracy is first proved.

So I would rule that as a matter of law on the evidence offered and the evidence proffered that a conspiracy under Section 1 could not be proved.

Under Section 2, the three theories which are advanced here are:

First, that there was an alleged conspiracy to monoplize; secondly, that there was an actual monopolization; and, thirdly, that there was an attempt to monopolize.

To deal with these in the order in which I have named them, what I have said about the Section 1 is equally applicable to the conspiracy to monopolize under Section 2, namely, that there is just no admissible proof which has been offered or proffered to prove a conspiracy between the defendant and anybody else.

To deal then with the second theory under Section 2, which arises under the provision of the Section, the phrase which is "who shall monopolize," I think that

there must be proved two essential elements: First, that the [846] defendant has a monopoly position, and, secondly, that it undertook an act which tends to strengthen that position.

Proof of a monopoly position, as I understand the law, is proof of the power to exclude competition or proof of the power to control prices.

No evidence has been offered of proof of the power to control prices, and I think the evidence is insufficient to show that there was the power to exclude competition. Even if I were to admit the statistical data in the trade publications -- and I might say parenthetically that I still persist in the view that I would have no right to receive that statistical information where on its face it shows that it is based largely, or at least in part, on estimate and that, consequently, I ought not to receive that evidence, if at all, at least until I received evidence on how the estimate was made and the probable degree of accuracy or error.

The fact is that even if I did let it in, it would show at most that the defendant had about fifty-nine per cent of the national market share in the industry relating to the sale of outboard engines and related parts. I still, I think, would have two logical problems or two legal problems, factual problems. They are really both factual and legal problems together.

First of all, I think I would have to define or [847] have defined what is the relevant market. The plaintiff in argument has urged that the relevant market is the national market. I am not certain in my own mind whether I could accept the national market as such, but assuming that I could, I then still have another problem and that is the fact that this national market is made up of the sale of three brands of engines, the Johnson, the Evinrude and the Gale, and the evidence offered to date indicates that while they all compete with one another, Gale perhaps to a lesser extent than the others, the fact is that Johnson and Evinrude directly compete with one another, so whether under these circumstances it is

legally permissible to group the three together and say that by grouping, the defendant has fifty-nine percent of the market, I am not certain, but even assuming that I start with the premise that the defendant has fifty-nine percent of the market share, I still do not think that this proves monopolization because in and of itself, it does not prove the power to exclude competitors and I do not find that the power to exclude competitors or to exclude competition is demonstrated by other proof in this case.

To deal with another element of the theory that a cause of action arises under the "who shall monopolize" language of Section 2, I have the problem of whether there is proof of any act tending to strenghten that position.

[848] Here again, I think that the proof which has been admitted and the proof which has been proffered falls short of what is required to make out a cause of action.

Of course, there is the proof, which I accept for the purposes of this stage of the proceedings, that the plaintiff's franchise was not renewed for the invidious reasons of Mr. Schiavina, namely, that this was done to exclude Mercury as one of the products which the plaintiff handled, but the fact of the matter is that the proof also shows that this franchise which was allowed to expire was in turn awarded to another Mercury dealer in the local area, geographically very close to the plaintiff and one which I think would, of necessity, have to be considered as competing in the trading area or the relevant market of which the plaintiff was a part, even if I assume that the relevant market is much narrower than the national market which the plaintiff urges on me.

Now, there is some proof that this other dealer over a period of time did give up this other franchise, but the fact of the matter is that there is no proof tendered to indicate the reason why he gave up this other franchise.

In short, what I am saying is that the proof shows that the franchise was given to somebody else and the proof fails to show that in giving it to somebody else,

that there was an express or an implied or an oral or a [849] written agreement extracted that the other franchise would be given up, either immediately or at some later date.

This becomes significant because it is admitted that this other dealer, as well as being in the local trading area in which the plaintiff traded, is within this District and is alive and is capable of being served with the process of this Court and brought into Court. The fact that he is not even proffered to be brought into Court, I think must be considered by me as an indication that if brought, he would deny that there was any such arrangement between him and the defendant with reference to giving up this competing line, and certainly if I had that denial, coupled with the fact that he handled a competing line when he was given what used to be the plaintiff's franchise and I have opposed to this proof only Mr. Schiavina's reasons for taking the plaintiff's franchise from him, there is just a lack of sufficient evidence on which I could say that there was an act on the part of the defendant which tended to strengthen that position.

This then brings me, gentlemen, to the third theory of recovery under Section 2 and the fourth overall theory, and that is the question of attempt to monopolize, and it is on that point that I would like to hear you further and in a little bit more detail.

Now, if you are ready to go ahead, I will be [850] glad to have you go ahead. I would prefer, Mr. Owen, Owen, to hear from you first and then to hear from Mr. Freishtat on that point.

Do you want a few minutes' recess to get your notes in order? I am perfectly willing to give it to you.

MR. OWEN: Before we take the recess, if Your Honor please, I wonder -- and I don't mean to be presumptuous but could you indicate in any way your question about the matter?

THE COURT: I can say this, that first of all, I have no question in my mind about the legal standard by which I have got to measure the sufficiency of the proof. I am

satisfied that there must appear evidence of specific intent to monopolize and a dangerous probability of success.

I recognize that the Tidewater case in the Ninth Circuits holds otherwise as to the probable degree of success and I am also aware of the fact that I indicated my own attraction to that doctrine in Campbell vs. Schlitz, but I am perfectly satisfied that that is the law of this Circuit and it is up to me to follow the law of this Circuit unless and until the Court of Appeals for this Circuit changes it."

I am more concerned about the factual aspects and that is the extent to which Mr. Schiavina's motives are chargeable to his employer, particularly if I accept, as I must, the proffered testimony that Mr. Canzona called to the [851] attention of other representatives of Outboard what Schiavina had said and what he was apparently intending to do and on what basis he was intending to do it, as to whether this could mount up to enough proof of specific intent that I ought to go ahead and see the witnesses and judge their credibility and hear whatever defense might be offered.

Then I am concerned also with the sufficiency of the proof to show dangerous possibility of success. Now, here in connection with dangerous possibility of success, I do not think that the proof must show that Outboard occupies a monopoly position as a premise from which to begin.

Query: If it does not occupy a monopoly position and if I have got to accept, as I think I must for this purpose of the case, that it controls about fifty-nine percent of the market, just what is the significance of evidence that Schiavina dealt with Amplex in the way he did, namely, recommended against the renewal of its franchise because it would not give up a competing line and what is the significance of other representatives of the defendant attempting to exert similar pressures on other dealers, the Neptune instance, for example, involving Towers, I think is the name of the dealer in Philadelphia.

MR. FREISHTAT: Johnson and Towers.

THE COURT: Johnson and Towers. I am, of course, aware of the testimony of Wright that with the other [852] Philadelphia dealer, whose name I must confess I have never known, where he tried to get him to give up a competing franchise where he was already a Johnson franchise holder and met with no degree of success, goes against this, but there is proffered testimony that Johnson attempted to exercise some degree of control over other dealers throughout the country. Some of them, of course, may be explained away on the grounds that it is legitimate in dealing with McFadden in Hagerstown to say to a dealer, unless you represent our entire line, we are not going to let you represent any of it, and possibly it is legitimate to say to Jackson in Oklahoma that if you do not carry the full line of parts, you cannot carry our line, but on the others, I would just like to hear your comments a little further.

MR. OWEN: If Your Honor please, I hate to ask this, but would it be possible to take a ten-minute recess to talk with my colleagues and get our thoughts in order?

THE COURT: Certainly, I will be glad to do that.

MR. OWEN: Thank you very much.

THE COURT: I will recess then for ten minutes. If you need more time, Mr. Owen, do not hestitate to take it.

MR. OWEN: Thank you. I do not think we will need it, sir.

(Thereupon, at the conclusion of a short recess, [853] the following proceedings were had:)

THE COURT: Gentlemen.

Are you ready now, Mr. Owen?

MR. OWEN: Yes. Thank you.

THE COURT: I think before you begin, there is one reason which entered into my thinking in connection with the "who shall monopolize" cause of action under Section 2 that I failed to state that I would like to make part of the record and that is this, that on the issue of whether the defendant occupied a monopoly position and more

particularly whether it had the power to exclude competiton, I think it extremely significant that the part of the plaintiff's case already proved and particularly that part through the testimony of Mr. Wright shows that in an attempt to exclude competition in Philadelphia, namely, the Johnson and Towers dealership, that the attempt was unsuccessful.

I suppose it is possible in a given case to prove that a person has the power to exclude competition without undertaking to prove that he in fact excluded competition, but I think when the proof goes beyond that and shows that he attempted to exclude competition and failed to succeed, that that pretty thoroughly negatives the idea that he had the power to exclude competition.

Now, having indulged me to permit me to express that additional argument, I will be glad to hear from you on [854] this other point.

* * *

[870] THE COURT: As I stated before in dealing with this third theory under Section 2 and fourth overall theory, that the defendant is liable as one who attempted to monopolize, the essential proof under the rule is this Circuit, which I think that I must obey, notwithstanding any attractiveness of the doctrine in the Ninth Circuit, is that there be proven a specific intent to monopolize and that there be proven a dangerous possibility of the success of the attempt.

I am satisfied that on the evidence which has been offered now and that which has been proffered, taking it in the light most favorable to the plaintiff, that these elements cannot be established.

I reach this conclusion because I am perfectly satisfied that the dangerous possibility of success of the [871] attempt is not established and cannot be established in this record.

Here, there is no doubt, there is no speculation as to what would be the effect of the defendant's requiring the plaintiff to deal exclusively in Johnson engines because

the proof shows exactly what happened after the plaintiff's franchise was removed from him.

The proof shows that the franchise was given to another dealer in the immediate trading area, who was also a dealer in Mercury engines.

Now, it is true that the proof shows that at some later time, a period of several years, this other dealer ultimately gave up handling Mercury engines the same way the plaintiff gave up handling Mercury engines, yet there is no proof whatsoever that there was any agreement, that there was any understanding or that there was any attempt to extort an agreement or an understanding from Gates, this other dealer, that he give up the Mercury engines at the time that he got the Johnson franchise or that he give them up at any time in the future.

On that state of facts, it seems to me that as a matter of law, it simply cannot be said that a dangerous possibility that Outboard would achieve any success of monopoly position has been shown.

The argument is made to me that this would be a [872] good example for Outboard to cite to its other dealers and after they saw what could happen to Amplex, to exert all sorts of pressures on them not only to carry on exclusive dealing but to carry on the boat line or to carry on whatever the defendant might will, but I think the answer to that is that there is not the slightest proof that this is what is done.

On the element then of attempt to monopolize, namely, that there appear a dangerous probability of success, there just cannot be a case spelled out under the proof which is offered.

I am inclined to the view also that the case would break down on proof of specific intent. Here, I might say that I do not have the same degree of certainty that I have on the dangerous probability of success because I think that circumstantially, it could be argued that Mr. Schiavina had an improper intent and that this intent was attributable to or chargeable to the defendant from the fact that Mr. Schiavina expressed his intent to the Presi-

dent of the plaintiff, as well as others, and that the knowledge that Mr. Schiavina was proceeding on this intent was communicated to other representatives of the defendant in a position superior to that of Mr. Schiavina.

Of course, if the proof came in, that is, if I heard the proof and judged the credibility of the witnesses [873] and more particularly what defense would be offered by the defendant, I think I might well come to the conclusion that not only from the lack of specific evidence of what Mr. Preston and his superiors and associates acted on and what explanation they might give of what they acted on, that I would conclude that specific intent also was not proved, but I am inclined to the view that giving the plaintiff all of the benefits and favorable inferences to which I think it is entitled at this stage of the proceeding, that I would be inclined to say that there was sufficient evidence to require a defense on the item of specific intent, notwithstanding the lack of evidence as to the basis on which Mr. Preston, his superiors and his associates acted; however, in fairness to the defendant and in support of the result overall that the plaintiff has demonstrated an inability to prove an attempt to monopolize under Section 2 of the Act, I think that I should go further and state that to me, it is highly significant that even if I charge Mr. Schiavina with all of the improper motives that I think can be inferred against him and must be inferred against him for the case in the position in which it is, that the fact that he in turn recommended the shift of the Johnson franchise to Gates, who was another Mercury dealer, and coupled with a complete failure of proof or proffered proof that there was any understanding or arrangement or pressure on Gates to give up [874] his Mercury franchise, that this weighs very heavily against saying that Mr. Schiavina had a specific intent to monopolize chargeable, under the theory that I have previously expressed, to the defendant itself.

Of one thing I am certain and that is with a sales organization of the size which the defendant has, namely, 12,-

000 to 15,000 dealers in 1961 and approximately 4,000 less when we get along to 1965, that I am not aware of any case which would say that a single instance of permitting a franchise to expire because of a refusal on the part of the franchise holder to accede to a policy of exclusive dealing, that a single isolated instance in an organization of this magnitude is sufficient to show specific intent on the part of the defendant to achieve a monopoly position or, indeed, to show that if it is done and accomplished in only one out of some 4,000 shifts or changes of franchise, that this shows that there is any dangerous probability of success in the attempt at monopolization.

I think it a fair statement really that on even balance, while I am not as certain and I have rather candidly expressed the bases of my uncertainty, that the proof is insufficient to prove specific intent. On even balance, I am certainly inclined to the view, and so hold, that proof of specific intent on the evidence offered and that proffered would be insufficient to establish the [875] objective sought to be accomplished.

I recognize overall that summary procedures in antitrust cases should be most sparingly applied. It is not any justification for the use of summary procedures that the calendars are congested, that the proof goes slowly, that a trial will be a protracted one, and I wish to state that these are not considerations, that is to say, the length of time for hearing all of the testimony, the fact that there are other cases waiting to be heard, the fact that this case would undoubtedly be protracted if all of the approximately forty additional witnesses proffered by the plaintiff were to be heard and be cross-examined, as well as any proof which might be offered in defense, assuming that a motion was not granted at the end of the plaintiff's case and a defense was to be undertaken.

Rather, I conclude that summary procedures here are proper solely because of the fact that on the basis of the evidence offered up to date and on the basis of the proffered testimony, drawing from it all inferences favor-

able to the plaintiff which can be drawn, that as a matter of law, there just simply is no case under any one of the four theories which have been advanced.

Accordingly, I will direct the Clerk to enter judgment for the defendant.

MR. FREISHTAT: For the record, I object to His [875a] Honor's ruling, and submit that based upon the argument, the facts and the law as argued, the plaintiff has established a prima facie case.

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INDEX

	Page
Statement	1
Interest of the United States	3
Discussion	6
Conclusion	13

CITATIONS

Cases:

Allied Equipment Co. v. *Weber Engineered Products, Inc.*, 237 F. 2d 879	11
Associated Beverages Co. v. *P. Ballantine & Sons*, 287 F. 2d 261	11
Conley v. *Gibson*, 355 U.S. 41	4
Dioguardi v. *Durning*, 139 F. 2d 774	4
Fashion Originators' Guild v. *Federal Trade Commission*, 312 U.S. 457	10
Hudson Sales Corp. v. *Waldrip*, 211 F. 2d 268	11
Klor's Inc. v. *Broadway-Hale Stores*, 359 U.S. 207	10
Lennerth v. *Mendenhall*, 234 F. Supp. 59	4
Leo J. Meyberg Co. v. *Eureka Williams Corp.*, 215 F. 2d 100, certiorari denied, 348 U.S. 875	11
Lessig v. *Tidewater Oil Co.*, 327 F. 2d 459	11
Mackey v. *Sears, Roebuck & Co.*, 237 F. 2d 869	11
McElhenny Co. v. *Western Auto Co.*, 269 F. 2d 332	6, 11
Missouri, Kansas & Tex. Ry. v. *Wulf*, 226 U.S. 570	4
Nelson Radio & Supply Co. v. *Motorola, Inc.*, 200 F. 2d 911, certiorari denied, 345 U.S. 925	10, 11
Outboard, Marine & Mfg. Co., 52 F.T.C. 1553	7, 8
Poller v. *Columbia Broadcasting System*, 368 U.S. 464	10
Quinn v. *Mobil Oil Co.*, 375 F. 2d 273	11
Simpson v. *Union Oil Co.*, 162 F. Supp. 746, reversed on other grounds, 377 U.S. 13	11
Standard Oil Co. v. *United States*, 337 U.S. 293	8

281-352—67——1

Cases—Continued

	Page
Times-Picayune Pub. Co. v. *United States*, 345 U.S. 594	9
United States v. *Colgate & Co.*, 250 U.S. 300	12
United States v. *Missouri-Kansas-Tex. R. Co.*, 273 F. 2d 474	4
United States v. *Parke, Davis & Co.*, 362 U.S. 29	10, 12
United States v. *Philadelphia National Bank*, 374 U.S. 321	7
United States v. *Sun Oil Co.*, 176 F. Supp. 715	10
Statutes and rule:	
Clayton Act, 15 U.S.C. 12–27:	
Section 3	3, 6, 7, 10, 11
Section 4	1, 8, 12
Sherman Act, 15 U.S.C. 1–7:	
Section 1	3, 6, 7, 11
Section 2	6
Federal Rules of Civil Procedure 8(a)	4

In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 668

AMPLEX OF MARYLAND, INC., PETITIONER

v.

OUTBOARD MARINE CORPORATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

STATEMENT

Petitioner, a dealer formerly franchised to sell at retail respondent's marine motors, brought this private treble damage antitrust suit under Section 4 of the Clayton Act (15 U.S.C. 15) against respondent to recover for injuries it suffered from respondent's termination of the franchise. The complaint alleged that respondent declined to renew petitioner's franchise because petitioner refused to deal exclusively in respondent's motors (Pet. App. 3).[1] After five days

[1] "Pet. App." refers to the appendix which petitioner filed in the Fourth Circuit, styled "Appellant's Appendix," and which it has filed with this Court. "Pet." refers to the two appendices bound with the petition for certiorari.

of a non-jury trial in the United States District Court for the District of Maryland, during which the court had heard the testimony of five of the approximately 40 witnesses to be called by the plaintiff, the court indicated its doubt that petitioner could prove any antitrust violation and directed that petitioner make an offer of whatever additional proof it expected to introduce. Petitioner made an offer of proof (Pet. App. 99–117), and argument was heard on the legal issues. The court ruled from the bench that, "accepting everything that the plaintiff has proved or proffered in the light most favorable to the plaintiff," it would not establish a violation of the antitrust laws, and it dismissed the complaint (Pet. B–1—B–12).

In the present posture of the case all of the relevant facts in the offer of proof must be taken as true, and all inferences favorable to petitioner must be drawn from such facts, as the district court recognized (Pet. B–1). According to the testimony and the offer of proof, respondent is the leading manufacturer of marine motors in the United States, and had nearly 60 percent of the market during the relevant years.[2] Respondent refused to renew petitioner's franchise because petitioner refused to discontinue selling a competitive brand, Mercury.[3] Respondent then awarded the franchise to another local Mercury dealer, who subsequently ceased to carry the Mercury line and

[2] Pet. A–4; Pet. App. 14, 99, 101.

[3] Pet. A–5; Pet. App. 14, 44–45, 47, 99, 102, 104–105, 116, 117. Respondent contends that it cancelled petitioner because its facilities were squalid (Pet. A–6), but the offer of proof is to the contrary (Pet. App. 103–109, 115).

dealt exclusively in respondent's motors.[4] As a result of the loss of respondent's franchise, petitioner's business failed.[5]

Respondent has tried to persuade dealers to deal exclusively in its motors and has at times threatened dealers with loss of franchise if they failed to do so.[6] Dealers have acquiesced in respondent's exclusivity demands.[7] Of the approximately 100 dealers in the Middle Atlantic sales territory where petitioner was located, all but 8 dealt exclusively in respondent's motors; the few exceptions were in rural areas where substitute dealers were hard to find.[8] Market conditions are such that a marine motor dealership probably cannot operate successfully without a major-brand franchise.[9]

The Court of Appeals for the Fourth Circuit affirmed the dismissal of the complaint (Pet. A–1—A–9), on the ground that a refusal to deal with a distributor who will not agree to an unlawful exclusivity arrangement does not violate Section 3 of the Clayton Act (15 U.S.C. 14) or Section 1 of the Sherman Act (15 U.S.C. 1).[10]

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[4] Pet. App. 147–150.

[5] Pet. App. 102, 106, 113, 115–116.

[6] Pet. App. 63, 65, 67, 69, 70, 71, 73, 77, 109–110, 112.

[7] Pet. App. 66, 67, 109, 110, 113.

[8] Pet. App. 94–96, 109.

[9] Pet. App. 102, 106, 110, 113, 115–117.

[10] The court of appeals pointed out that, although petitioner had not invoked Section 3 of the Clayton Act and had relied on Section 1 of the Sherman Act instead, nonetheless Section 3 "approaches the plaintiff's grievances more closely than does the statute pleaded" (Pet. A–6, A–7). We think that the court of appeals correctly considered the Section 3 issue notwithstand-

INTEREST OF THE UNITED STATES

In view of the variety and scale of the nation's commerce, it would be virtually impossible for the government to discover, investigate and proceed against every scheme proscribed by the antitrust laws. Private treble damage suits serve the important public purpose of supplementing the government's enforcement activities, and thus play a major role in obtaining compliance with those laws. It is therefore a matter of concern to the United States when private enforcement of the antitrust laws has proven ineffective in any significant respect. Such a situation has developed with respect to the proscription of exclusive dealing arrangements.

Under the existing lower-court case law, a distributor who has been cut off by his supplier for refusing to deal exclusively in the supplier's products generally has been denied recovery under the antitrust laws for his resulting damage, on the theory that a refusal to deal involves no unlawful "agreement" with, or consummated sale to, the cancelled dealer.[11] Since the tacit acquiescence of distributors in exclusive dealing arrangements can frequently be obtained through threats of refusal to deal—especially if an occasional intractable dealer is cut off as an example to others—

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ing the failure of the complaint to refer to that Act. See *Conley* v. *Gibson*, 355 U.S. 41, 47–48; *Missouri, Kansas & Tex. Ry.* v. *Wulf*, 226 U.S. 570, 576; *United States* v. *Missouri-Kansas-Tex. R. Co.*, 278 F. 2d 474 (C.A. 10); *Dioguardi* v. *Durning*, 139 F. 2d 774 (C.A. 2); *Lennerth* v. *Mendenhall*, 234 F. Supp. 59 (N.D. Ohio); F.R. Civ. P. 8(a).

[11] See the cases cited *infra*, pp. 10–11.

a serious loophole has developed in antitrust enforcement.

From the supplier's point of view, reliance on threats of refusal to deal avoids the risk of inserting express exclusive dealing clauses in franchise agreements. Such a clause might prove unenforceable in an action on the contract and, indeed, might constitute damning evidence in an antitrust action. Moreover, the lower-court rule involved in this case creates an insurmountable obstacle to the recovery of damages by dealers who are cast out because they refuse to deal exclusively. Paradoxically, the rule may put the cancelled dealer who has refused to agree to violate the law in a worse position than if he had agreed to an illegal exclusive dealing arrangement embodied in a franchise contract. This result is particularly unfortunate for antitrust enforcement because it is precisely the cancelled dealer who is likely to have both the motive to litigate and the evidence needed to prevail. Experience indicates that the dealer who has retained his franchise may be reluctant to endanger his source of supply, while competitors of the supplier, who have been injured by the cutting off of access to the outlets that handle the supplier's products exclusively, may lack the necessary evidence.

In affirming the dismissal of the complaint in the present case, the court of appeals applied the prevailing lower court rule that bars a dealer from recovering under the antitrust laws against a supplier who cancels his franchise because he will not accede to an unlawful exclusive dealing arrangement in which

other dealers have acquiesced. The validity of the rule thus is directly presented. We believe, for the reasons set forth below, that the rule is unsound and should be rejected. Review by this Court is appropriate because of the adverse impact the rule has upon antitrust enforcement, particularly in view of the ever-increasing use of franchise dealerships in retail distribution.[12]

DISCUSSION

1. The decision below rests on the proposition that Section 3 of the Clayton Act and Section 1 of the Sherman Act are "directed against executed transactions of lease, sale or contract containing the forbidden condition, agreement or understanding." Pet. A–8, quoting *McElhenny Co.* v. *Western Auto Supply Co.*, 269 F. 2d 332, 338 (C.A. 4). Finding that respondent refused to deal with petitioner, the court concluded that the requisite executed agreement was lacking and affirmed the dismissal of petitioner's complaint. We submit that the court's analysis stopped much too soon.

Petitioner proved or offered to prove that respondent has tried to persuade its dealers to refrain from

[12] The petition also presents the preliminary procedural question whether the court of appeals erred in refusing to treat as true, on what amounts to a motion to dismiss, the facts set out in petitioner's offer of proof. Since we think that this ruling was plainly erroneous, we do not discuss it, but accept as proved what petitioner offered to prove.

The petition also raises questions under Section 2 of the Sherman Act and urges that petitioner made out a case of unlawful monopolization. We express no view on that aspect of the case.

carrying its competitors' motors, that respondent has threatened dealers with the termination of their franchises for failure to deal exclusively with respondent, and that most dealers do in fact deal with respondent on an exclusive basis. See p. 3, *supra*. We believe that such proof would justify a finding that—in the language of Section 3 of the Clayton Act—respondent sold its motors "on the condition, agreement, or understanding that the * * * purchaser thereof shall not * * * deal in the goods, wares, [or] merchandise * * * of a competitor" (15 U.S.C 14). Moreover, although the court below did not reach the question, we think that the record shows that the respondent's exclusive dealing produced a sufficiently serious foreclosure of outlets to respondent's competitors to establish the requisite anticompetitive effect under either Section 1 of the Sherman Act or Section 3 of the Clayton Act.[13] See *United States* v. *Philadelphia*

[13] The court below did not reach the question of the anticompetitive effect of respondent's exclusive dealing arrangements and that question is not before this Court. Ten years ago, the Federal Trade Commission held that the respondent's exclusive dealing arrangements had a significantly adverse effect upon competition because they foreclosed competing manufacturers from a significant share of the market. In *Outboard, Marine & Mfg. Co.*, 52 F.T.C. 1553, as here, respondent Outboard, the dominant small-boat motor manufacturer (*id.* at 1554), was charged with not allowing its dealers to carry other brands of marine motors. Since dealers generally prefer to carry a full line of motor sizes (*id.* at 1569, 1572), those competitors of Outboard which manufactured only partial lines of motors were unable to secure access to many first-class outlets (*ibid.*). The Commission's examiner found that a significant capital outlay was required to produce each motor size (*id.* at 1576); that, had respondent not foreclosed so many outlets to

National Bank, 374 U.S. 321, 365–366; *Standard Oil Company* v. *United States,* 337 U.S. 293. Finally, petitioner's evidence showed that its franchise was cancelled because it carried a competitive line of motors.

In these circumstances, respondent's refusal to deal with petitioner appears to serve an integral function in maintaining an unlawful system of exclusive dealing and of preserving the tacit acquiescence of its other dealers in that system. The exclusive dealing arrangements and the refusal to deal are thus merely two aspects of the same illegal design.

Section 4 of the Clayton Act permits any person "injured in his business or property by reason of anything forbidden in the antitrust laws" to maintain a private treble damage action. If petitioner was injured by the refusal to deal—as it alleges—such injury was "by reason of [something] forbidden in the antitrust laws," namely, respondent's illegal exclusive-dealing arrangements. These arrangements cannot properly be viewed in isolation from the

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competitors, competitors with a partial range of motor sizes would have been better able to enter the market; and that respondent's exclusive dealing policy forced competitors either to produce a full line or else to fall back on second-rate distributors—thus imposing on competitors the choice between a large capital outlay or high distribution costs. The Commission affirmed the initial decision, concluding that "the trial record fully supports a conclusion of probable injury to competition through the foreclosure of competitors from a substantial and highly desirable portion of the outboard motor market" (*id.* at 1579).

Petitioner's proof and offer of proof in the present case would justify similar conclusions to those made by the Federal Trade Commission.

refusal to deal with petitioner. They are inextricably interrelated. Were it not for the fact that a significant number of franchisees were willing to accede to respondent's exclusive dealing arrangements, respondent would not have been able to refuse to deal with a recalcitrant distributor. Furthermore, the termination of petitioner's franchise necessarily indicated to other dealers that respondent's threats of cancellation for handling competing products were to be taken seriously, and thus tended to insure continued acquiescence in respondent's exclusive dealing arrangements.

The basic error of the court of appeals was in failing to recognize these economic realities, and in rejecting petitioner's claim for want of an unlawful agreement between respondent and petitioner while ignoring the tacit agreements between respondents and its other dealers which made possible the refusal to deal with petitioner.

2. This Court stated the general principles applicable to refusals to deal in *Times-Picayune Pub. Co.* v. *United States*, 345 U.S. 594, 625:

> Refusals to sell, without more, do not violate the law. Though group boycotts, or concerted refusals to deal, clearly run afoul of § 1, * * * different criteria have long applied to qualify the rights of an individual seller. Beginning with *United States* v. *Colgate & Co.*, 250 U.S. 300 (1919), this Court's decisions have recognized individual refusals to sell as a general right, though "neither absolute nor exempt from regulation." *Lorain Journal* v. *United States*, 342 U.S. 143, 155 (1951). If accompanied by unlawful conduct or agreement, or con-

> ceived in monopolistic purpose or market control, even individual sellers' refusals to deal have transgressed the Act. [Citations and footnote omitted.] [14]

The government's right to antitrust relief, and the cancelled dealer's right to recover, is well established in cases of concerted refusals to deal, as where suppliers act together or at the behest of rival dealers. See *Klor's, Inc.* v. *Broadway-Hale Stores, Inc.*, 359 U.S. 207; *Fashion Originators' Guild* v. *Federal Trade Commission*, 312 U.S. 457. The Court has also sustained the government's right to relief under the Sherman Act against a supplier who uses an announced policy of refusal to deal as a means of putting together a combination to maintain resale prices. See *United States* v. *Parke, Davis & Co.*, 362 U.S. 29.[15] But this Court has not yet expressly passed upon the question, presented here, of the cancelled dealer's right to relief against such a supplier—*i.e.*, one who uses refusal to deal as a means to secure compliance with an anticompetitive program embodied in tacit agreements with acquiescent dealers.

A substantial number of lower courts, however, have held that the cancelled dealer cannot recover. The leading case is *Nelson Radio & Supply Co.* v. *Moto-*

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[14] Accord, *Poller* v. *Columbia Broadcasting System*, 368 U.S. 464, 469.

[15] A district court has held that the government is entitled to relief under Section 3 of the Clayton Act where a supplier used refusal to deal as a means of establishing an exclusive dealing program among a series of dealers who separately acquiesced in the program. *United States* v. *Sun Oil Co.*, 176 F. Supp. 715 (E.D. Pa.).

rola, Inc., 200 F. 2d 911 (C.A. 5), certiorari denied, 345 U.S. 925. Accord, *Hudson Sales Corp.* v. *Waldrip*, 211 F. 2d 268 (C.A. 5); *Leo J. Meyberg Co.* v. *Eureka Williams Corp.*, 215 F. 2d 100 (C.A. 9), certiorari denied, 348 U.S. 875; *Mackey* v. *Sears, Roebuck & Co.*, 237 F. 2d 869 (C.A. 7); *Allied Equipment Co.* v. *Weber Engineered Products, Inc.*, 237 F. 2d 879 (C.A. 4); *Associated Beverages Co.* v. *P. Ballantine & Sons*, 287 F. 2d 261 (C.A. 5); *Quinn* v. *Mobil Oil Co.*, 375 F. 2d 273 (C.A. 1); see *Simpson* v. *Union Oil Co.*, 162 F. Supp. 746 (N.D. Calif.), reversed on other grounds, 377 U.S. 13; see, contra, *Lessig* v. *Tidewater Oil Co.*, 327 F. 2d 459 (C.A. 9). Under this line of authority, which the court below followed, the dealer disciplined by cancellation or non-renewal of his franchise when he refuses to agree to an arrangement in violation of the antitrust laws has no remedy, because Section 3 of the Clayton Act and Section 1 of the Sherman Act prohibit only executed sales or agreements on restrictive conditions—and not refusals to deal.

To be sure, these decisions recognize that the defendant supplier has made sales to and agreements with dealers other than the plaintiff. But those sales and agreements, even though they may violate the antitrust laws, are deemed immaterial on the ground that "it is the absence of a contract with the plaintiff, not the presence of the agreements with distributors in other parts of the country, of which the plaintiff must complain" (*Nelson, supra*, 200 F. 2d at 915). Thus the court below quoted one of its earlier opinions (*McElhenny Co.* v. *Western Auto Co.*, 269 F. 2d

332, 337–338) for the proposition that a seller is not "liable in damages for refusing to deal with one who is unwilling to enter into an unlawful vertical price agreement or an exclusive dealing arrangement" (Pet. A–7—A–8). The result is to deny redress to the dealer who has suffered injury for his unwillingness to fall in line by acceding to an unlawful program. Such an anomalous result is not justified by the broad language of Section 4 of the Clayton Act and would defeat the objectives of Congress in creating the private antitrust remedy.

We urge, therefore, that a refusal to deal is actionable under Section 4 of the Clayton Act, which simply requires that the injury be "by reason of anything forbidden in the antitrust laws," when it is used to secure, or in an attempt to secure, agreement to a proposal which, if acceded to, would (1) comprise one of a set of contracts in unreasonable restraint of trade, or (2) constitute one of a number of sales agreements made on condition or understanding of unlawful exclusive dealing. To the extent, if any, that such a ruling may further curtail "the limited dispensation" conferred on refusals to deal under the doctrine of *United States* v. *Colgate & Co.*, 250 U.S. 300, as already qualified in *United States* v. *Parke Davis & Co.*, 362 U.S. 29, we would urge that such curtailment is required for the proper enforcement of the antitrust laws.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be granted.

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No. 668

IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

AMPLEX OF MARYLAND, INC., *Petitioner,*

v.

OUTBOARD MARINE CORPORATION, *Respondent.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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INDEX

	Page
QUESTIONS PRESENTED	3
COUNTERSTATEMENT	3
1. The Procedure Followed at the Trial	3
2. Petitioner's Evidence	7
3. Petitioner's Theories of Violation and the Findings of the Courts Below	18
REASONS FOR THE DENIAL OF THE WRIT	21
I. The Antitrust Question for Which Petitioner Seeks Review Is Not Presented on This Record	21
II. The Question for Which the Government Seeks Review Is Not Presented on This Record	28
III. There Is No Noteworthy Question of Procedure Here Involved	35
CONCLUSION	36

CITATIONS

Cases:

Continental Ore Co. v. *Union Carbide & Carbon Corp.*, 370 U.S. 690 (1962)	35
Goodyear Tire & Rubber Co. v. *Ray-O-Vac Co.*, 321 U.S. 275 (1944)	2
Graver Tank & Mfg. Co. v. *Linde Air Products Co.*, 336 U.S. 271 (1949)	2
Osborn v. *Sinclair Refining Co.*, 324 F.2d 566 (4th Cir. 1963)	34
Poller v. *Columbia Broadcasting Company*, 368 U.S. 464 (1962)	35
Procter & Gamble Co., [1963-1965 Transfer Binder] Trade Reg. Rep. ¶ 16,673, at 21,560 (FTC 1963)	28
United States v. *Columbia Steel Co.*, 334 U.S. 495 (1948)	33
United States v. *Parke, Davis & Co.*, 362 U.S. 29 (1960)	18, 19, 20, 32

Statutes and Rules: Page

Clayton Act, Section 3
15 U.S.C. § 14 (1964) 18, 20, 21, 28, 32, 34

Sherman Act, Section 1
15 U.S.C. § 1 (1964) 1, 3, 18, 19, 20, 28, 32, 34

Sherman Act, Section 2
15 U.S.C. § 2 (1964) 1, 3, 19, 20, 28

Federal Rules of Civil Procedure 41(b) 19

Miscellaneous:

Bain, *Barriers to New Competition* (1956) 28
Bain, *Industrial Organization* (1959) 28
Kaysen & Turner, *Antitrust Policy* (1959) 28
Notes of Advisory Committee, Rule 41(b), 28 U.S.C.A., p. 205 (1958 ed.) 19
Yachting Magazine, October, 1967, at 46 25

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This case turns entirely upon issues of fact. The plaintiff, petitioner here, was a marine dealer who alleged that an outboard motor manufacturer, respondent here, refused to sell its outboard motors to the dealer and that, in so refusing, respondent violated Sections 1 and 2 of the Sherman Act. Petitioner-plaintiff waived a jury and the case was tried to District Judge (now Circuit Judge) Harrison Winter sitting without

a jury. At the close of plaintiff's case the District Court made findings of fact which, under familiar and undisputed principles of law, refuted liability on the part of the manufacturer. Petitioner appealed, asserting that the District Court had found the facts incorrectly, but the Court of Appeals for the Fourth Circuit concurred in the lower court's findings and affirmed. Given these concurrent findings by the two courts below, it would seem *prima facie* that this is not a case which should be reviewed on the facts by this Court. *Graver Tank & Mfg. Co.* v. *Linde Air Products Co.*, 336 U.S. 271 (1949); *Goodyear Tire & Rubber Co.* v. *Ray-O-Vac Co.*, 321 U.S. 275 (1944).

In its efforts to keep the case alive petitioner has gone to quite extraordinary lengths in this Court. In fact it is difficult to recognize the case from the petition. By distortions built upon fragments of fact without record citation, by frank reliance on matters outside the record, and by the assertion of claims which were not mentioned in the courts below, petitioner has presented an ingenious but entirely misleading picture of an otherwise unnoteworthy case.

Moreover, the erroneous factual picture set forth in the petition has apparently led the Department of Justice to believe that the case involves a new and important question of antitrust law, with the result that the United States has filed a memorandum in support of the petition. With all due respect, respondent submits that the Government's memorandum is not based upon a responsible reading of the record and that the antitrust issue for which the Government seeks review is not in fact involved in the case at all. The actual nature of the case is as follows.

QUESTIONS PRESENTED

The only questions properly before this Court are as follows:

(1) Where an antitrust plaintiff's evidence shows, and the courts below concurrently find, that the defendant-manufacturer is not engaged in a program to require its dealers generally to deal exclusively in its products, but rather has a policy of not discriminating against those who handle competing products, is a violation of Section 1 or Section 2 of the Sherman Act established merely by proof that the manufacturer unilaterally refused to deal with a single dealer who was handling competing products?

(2) Where an antitrust plaintiff, after introducing its principal evidence, is offered and voluntarily accepts an opportunity to make a proffer as to all of its remaining evidence, and where the District Court, sitting without a jury, then accepts as true all facts directly proved or proffered by the plaintiff, must that District Court then draw all inferences from those facts in favor of the plaintiff in determining whether the plaintiff has a cause of action, or may the Court draw inferences from those facts as at the close of the plaintiff's case?

COUNTERSTATEMENT

1. The Procedure Followed at the Trial

At the beginning of the trial petitioner made an opening statement to the Court (Tr. 7-23). At the close of the statement the Court was in serious doubt as to whether the facts alleged in the opening statement, if proved, would constitute a cause of action

under the Sherman Act.[1] Nevertheless, petitioner was allowed to proceed with its case, and in the next four and one-half trial days petitioner presented the testimony of five witnesses, introduced voluminous documentary exhibits into evidence, and thus compiled a trial transcript of about 760 pages. Petitioner's principal witnesses were as follows:

(1) Nicholas Canzona was the president and principal stockholder of petitioner (R.A. 1, 4).[2] Generally, he testified that petitioner operated a marine dealership in Arnold, Maryland, that in the spring of 1960 petitioner had been awarded a franchise to sell the so-called "Johnson" outboard motor manufactured by respondent's Johnson Division, that that franchise had been renewed for the year 1961, that respondent had refused to renew it for the year 1962, and that the reason for the refusal to renew was the fact that in 1961 the petitioner had begun to sell the so-called "Mercury" outboard motor (R.A. 17; Pl. Ex. 33, R.A. 196-99; P.A. 44-45).

(2) Paul Wright was a former employee of respondent. In 1960 he was employed as a salesman for respondent's Johnson Division, covering a territory ("Territory 23") which included petitioner's place of business (P.A. 57, 58-59). It was Mr. Wright who recommended that petitioner be given a Johnson dealership in April 1960 and who recommended the re-

[1] The doubt, while not expressed until later in the trial, existed from the outset (Tr. 516).

[2] "P.A." and "P.S.A." refer, respectively, to petitioner's Appendix and Supplemental Appendix containing that portion of the record that was printed for the Court of Appeals. "R.A." refers to respondent's printed Appendix.

newal of the franchise for 1961 (P.A. 58-59; Pl. Ex. 33, R.A. 197). Mr. Wright left the respondent's employ in February 1961 (P.A. 57).

(3) Mr. Elio Schiavina was Mr. Wright's immediate successor as the Jackson salesman for Territory 23 (R.A. 65). It was Mr. Schiavina who recommended to his supervisors that the petitioner's franchise not be renewed at its expiration at the end of September 1961 (R.A. 76-77; Tr. 701).

The foregoing witnesses were the principal actors in the events which gave rise to the case, but at the conclusion of their testimony there apparently was a question in Judge Winter's mind as to whether petitioner had even begun to establish an antitrust violation (see R.A. 81-83). Petitioner had made known that it intended to call approximately forty additional witnesses, but the District Court had some doubt that the additional testimony would add what was necessary for petitioner to make out a case (Tr. 745-46; R.A. 81). There was the possibility, therefore, of several weeks of trial resulting only in a waste of effort on the part of the Court and the parties.

Under these circumstances Judge Winter made a "suggestion" as to which he invited "any comments now that you [petitioner] want to make" (R.A. 84). The suggestion was that the trial be recessed to give the parties an opportunity to brief the law applicable to the case and to give petitioner an opportunity to prepare and to make a proffer of all additional evidence that it proposed to offer (R.A. 84). Contrary to petitioner's statement in this Court that "the district court intimated that it was about to dismiss the case"

(Pet. 2-3), the District Court when making its suggestion said,

> "I do not know whether you have a possible case or whether you do not, but I do have the basic feeling, which I have expressed to you before, and that is that if I conclude that you do not have a possible case, in your interests, in my interests and in the interests of the defendant, it is better to face it now." (R.A. 84)

To this petitioner's counsel immediately and directly responded,

> "I think Your Honor is very much correct, and I concur with everything said as to the preparation of the brief and a proffer as to the testimony that I would hope to offer and at that time, if it is Your Honor's opinion that based upon the brief and proffered testimony that there is no case, that the proceedings would be closed at that time and if plaintiff desired an appeal, he would take it at that time." (R.A. 84)

The suggestions in the petition (pp. 3, 23) and in the Government's Memorandum (p. 2) that the Court "required" and "directed" the petitioner to truncate its case against its will are hardly accurate.

After approximately a week's recess in the trial, briefs were submitted, oral argument was held, and petitioner made a detailed proffer of the additional evidence, both testimonial and documentary, which it proposed to introduce, and in the course thereof gave a full description of its proposed additional proof (presumably described in its best possible light from petitioner's standpoint) (P.A. 98-117).

Thereupon the District Court found and concluded that petitioner's total proof, both that already in evi-

dence and that proffered, was insufficient to prove any violation of law by respondent, on any theory of the law or facts advanced by petitioner (Pet. B-1-12; P.A. 11-15, 17-22). Because nothing would have been gained by proceeding further, the Court entered judgment for respondent.

2. Petitioner's Evidence

The facts established during petitioner's case were in material part as follows:

1. Respondent Outboard Marine Corporation (OMC) manufactured, among other things, three different brands of outboard motors—Johnson, Evinrude and Gale—each of which was manufactured and distributed by a separate Division. Each Division sold its outboard motors to independent dealers, who resold at retail (Pl. Ex. 68, R.A. 204-05).

2. Respondent was one of 12 outboard motor manufacturers in the United States. For the purpose of this case both courts below assumed that respondent's three motors (Johnson, Evinrude, and Gale), taken together, constituted slightly less than 60% of the outboard motors sold in the United States in the relevant period (P.A. 99; Pet. B-6, A-4, A-6). Among the other eleven manufacturers were the Kiekhaefer Division of Brunswick Corporation, which manufactures the "Mercury" motor, and McCulloch Corporation, which manufactures the "Scott" motor (P.A. 28).

3. Petitioner offered to prove that the 12 outboard motor manufacturers distribute their motors through some 12,000 to 15,000 outboard motor dealers (P.A. 99). Respondent's three brands are distributed through a total of 8,700 dealers (Pl. Ex. 68, R.A.

205). There is no evidence as to how many of those 8,700 dealers handle the Johnson motor (as distinguished from the Evinrude and Gale motors).

4. There is evidence that the majority of the 12,000-15,000 motor dealers in the United States handle only a single line of engines (Def. Ex. 9, P.A. 42). Petitioner did not prove or offer to prove that the majority of respondent's 8,700 dealers handle only one line of engines, but it is undoubtedly the fact that most of respondent's dealers do concentrate on one or another of respondent's lines.

5. On the critical question as to *why* the majority of all marine dealers handle only one brand of motor, the only evidence in the record is to the effect that most dealers personally *prefer* to concentrate on one line (Def. Ex. 9, P.A. 142), perhaps for the same reasons that prompt most automobile dealers to concentrate on one line[3] (*e.g.*, in order to minimize the costs involved in carrying substantial inventories, training expenses for service personnel, etc.).

6. Petitioner's own witnesses, Messrs. Wright and Schiavina, testified that at all relevant times respondent had in force an affirmative policy of *not* declining to do business with a dealer because he was handling competitive products. That policy was embodied in printed instructions that were issued, and annually reissued, to Johnson's sales personnel (Def. Ex. 9, P.A.

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[3] Although there is no evidence in the record that most automobile dealers concentrate on one line, petitioner asserts in this Court (Pet. 10) that the "30,000 franchised automobile dealers . . . deal exclusively or primarily [in] the products of a single supplier", and respondent is prepared to accept the assertion for the purposes of argument on the instant petition for certiorari.

142; P.A. 88-89; R.A. 61-62, 64).[4] The same witnesses also testified that Johnson's management had in fact no objection to petitioner's or any other dealer's handling competing motors (R.A. 57, 64). As Mr. Wright testified, the Johnson salesmen customarily informed the Johnson management when dealers were handling competitive motors, and the management would award a dealership to such a dealer if he also offered promise as a Johnson dealer (R.A. 57). In short, the petitioner affirmatively established on its own case, primarily through the testimony of an ex-employee of respondent, that respondent does *not* require its dealers to practice exclusive dealing. The suggestions made by the petitioner and the Government to the contrary are not supported by the record (indeed, they are asserted without record citation), and they are not true.

7. In April 1960, upon recommendation of Mr. Wright (R.A. 56), the Johnson Division awarded a Johnson dealership to petitioner (Pl. Ex. 11, R.A. 192-95), and respondent began selling Johnson motors to petitioner in May (R.A. 17). The dealership was en-

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[4] Typical of petitioner's use of matter which is not in the record is its reference to a 1956 Federal Trade Commission cease and desist order and hearsay evidence as to the supposed attitudes of certain of respondent's salesmen (Pet. 6-7). The District Court refused to receive in evidence either the cease and desist order or the hearsay testimony (Pretrial Order, P.A. 9; P.A. 80, 64-65). Neither of these evidentiary rulings was challenged by petitioner in the Court of Appeals below, and petitioner therefore has no right to rely upon the excluded matter in this Court. For the same reason the Government's reliance upon the same excluded evidence is also improper (Gov. Mem. 7-8 n. 13). If the Federal Trade Commission proceeding is to be considered at all, it should be borne in mind that the evidence in that case related to conduct which took place in late 1940's, long before the promulgation of the written policy referred to in the text.

tered under a written dealer agreement which contained no provision for renewal and which expired by its own express terms on September 30, 1960 (Pl. Ex. 11, R.A. 192-95).

8. Before it awarded the dealership to petitioner, the Johnson Division management knew that petitioner was successfully handling a competing motor, Scott, under a franchise agreement with the manufacturer (Pl. Ex. 6, R.A. 186-89; Def. Ex. 15, R.A. 96; P.A. 77). The Johnson dealership was nevertheless awarded, and petitioner sold both Johnson and Scott motors thereafter. As petitioner admits, Scott offered a full line of engines (Pet. 6).

9. Mr. Wright testified that soon after the award of petitioner's franchise he "suggested" to petitioner that it give up its Scott franchise and "phase out" the Scott motor (P.A. 41, 67). Mr. Wright (who had left respondent's employ five years before the trial and could in no sense be regarded as hostile to petitioner or friendly toward respondent) also stated unequivocally that his action violated company policy and was never reported by him to any superior (P.A. 69-72). Moreover, he made clear that at no time did the management of the Johnson Division "ever make any objection to [petitioner's] handling of competing lines of motors" (R.A. 57).[5]

10. Petitioner continued to handle Scott engines throughout its relationship with respondent. At the beginning of 1961 petitioner had on hand approximately 20 Scott engines, and in the spring of 1961, a year after

[5] Compare petitioner's erroneous assertion (made without record citation) that respondent "required" petitioner "to agree to 'phase out' " the Scott engine (Pet. 6).

the alleged "phase-out" suggestion by Mr. Wright, petitioner purchased "about 20" new Scott engines (R.A. 14, 15, 17; Tr. 602-03, 632), thus putting itself in a position to sell as many Scott engines in 1961 as it had sold in any preceding year (R.A. 15, 16). To support this project the petitioner advertised its Scott engines ahead of its Johnson engines (R.A. 23-24; Def. Ex. 19, R.A. 129). Petitioner continued to handle Scott engines until 1962, when Scott cancelled petitioner's franchise (R.A. 41).

11. When the first Johnson agreement expired in September 1960, Johnson awarded petitioner a new dealership agreement for the ensuing year (Pl. Ex. 33, R.A. 196-99), obviously knowing that petitioner was handling Scott, as well as Johnson, motors (R.A. 56-57; P.A. 59). Neither of petitioner's Johnson dealer agreements contained any provision restricting its right to deal in competing motors (Pl. Ex. 11, R.A. 192-95; Pl. Ex. 33, R.A. 196-99).

12. In or about March 1961 Mr. Schiavina replaced Mr. Wright as the Johnson sales representative for Territory 23, which included Arnold, Maryland, petitioner's place of business (P.A. 24; R.A. 95, 65). At that time petitioner was handling both the Johnson and the Scott motor, and Mr. Schiavina never made any objection to petitioner's handling of that competing brand.[6]

13. Following his arrival in the territory Mr. Schiavina submitted a series of written reports on petitioner's operations to the Johnson management in Wau-

[6] Despite lengthy testimony as to conversations between Schiavina and petitioner, the latter has never suggested that Schiavina had any objection to petitioner's handling of Scott.

kegan, Illinois. On March 8, 1961, he reported that petitioner's "Display" was "Poor"; that its "Attitude" was "Fair" and that its "Service Facilities" were "Poor" (Pl. Ex. 73, P.A. 137-38). The report also included these comments: "Place of business little on the squalid side and can stand improvements"; "It is a question in my mind how long he can stay solvent"; and "Not happy with this operation".

14. Another employee of respondent, Service Representative Lee Clayton, also visited petitioner's place of business in the spring of 1961 and reported in writing to the Johnson management on April 6 that, while petitioner's service arrangements might eventually be good, petitioner's "shop condition" is "a mess at present, being completely changed around" (Pl. Ex. 72, R.A. 207-08). For this reason, as among the possible "Service Station Listings" of "AA", "A" or "None", Mr. Clayton recommended no service station listing. Mr. Canzona himself testified that the projected improvements which prompted Mr. Clayton's earlier optimism for petitioner's service arrangements were never actually made (R.A. 2-3).

15. Mr. Schiavina visited petitioner's place of business again in May and reported in writing to the Johnson management on May 10, 1961, that, although petitioner had made some improvements in his place of business, Schiavina was still dissatisfied: "We discuss[ed] his squalid condition and he agreed that he has to clean it up" (Pl. Ex. 74, P.A. 139).

16. On July 20, 1961, Mr. Schiavina submitted still another written report (a so-called "dealer review") to the Johnson management, commenting that petitioner's "Service" was "Poorly organized—squalid—

can stand improvements" (Pl. Ex. 22, P.A. 143-44). Mr. Schiavina also concurred with Mr. Clayton's recommendation that petitioner be given no service station listing. The report concluded as follows: "Recommend 1962 Dealer Agreement be held pending further investigation in this area. I [am] very disappointed with this dealer's service shop set-up. He is not keeping a stock and record book".

17. During the period of Mr. Schiavina's dealings with petitioner the Johnson management and Schiavina received complaints concerning petitioner's servicing of motors of customers who had bought Johnson motors (R.A. 65-66, 73).

18. In the same period respondent had continuous credit difficulties with petitioner (R.A. 18). As Mr. Canzona admitted, petitioner was "slow pay" with respect to its various suppliers, including respondent (P.A. 35; R.A. 18; Def. Ex. 16, R.A. 98-125; Def. Ex. 20, R.A. 130-51; Def. Ex. 32, R.A. 158-77).

19. The courts below treated it as established that in the summer of 1961 Schiavina learned that petitioner had taken on a franchise to sell Mercury motors (in addition to Johnson and Scott) and that he protested to petitioner about this additional franchise (see Pet. A-5). There is no evidence that, if these events occurred, Schiavina so advised the Johnson management.

20. In the summer of 1961, being dissatisfied with petitioner as a Johnson dealer, Schiavina investigated and found a potential new dealer six miles away. The new prospect was Nat Gates & Sons, an established marine dealer whom Schiavina described to the Johnson management as "one of the best dealers in this Annapolis area" (Def. Ex. 47, P.A. 148). Under an

earlier arrangement with respondent's Evinrude Division, Gates had achieved the extraordinary sales rate of 500 Evinrude motors per year (R.A. 79-80).

21. In reporting to the Johnson management with respect to Gates' potentiality as a Johnson dealer, Schiavina advised his superiors that Gates was then handling Mercury motors and intended to continue to do so (Def. Ex. 46, P.A. 147).

22. Shortly thereafter Schiavina recommended to the Johnson management that petitioner's Johnson franchise not be renewed and that the franchise be awarded to Gates (Def. Ex. 47, P.A. 148). The courts below treated it as established that Schiavina recommended non-renewal of petitioner's franchise because petitioner had taken on the third line of motors (Mercury) (Pet. B-4, A-5).

23. Respondent decided to allow petitioner's Johnson franchise to lapse and to award the franchise to Gates. The decision was made not by Mr. Schiavina, but by his superiors in the Waukegan office [7] which had been receiving complaints about petitioner from its field personnel and customers and had been experiencing credit difficulties with petitioner (R.A. 65-66, 73; P.A. 35; R.A. 18, 64).

24. Following the award of the Johnson franchise to Gates, the latter continued to sell both Johnson and Mercury motors with the full knowledge of the Johnson management (see Def. Ex. 46, P.A. 147). Ultimately Gates ceased handling the Mercury motor when Mer-

[7] The decision not to renew the petitioner's Johnson franchise was actually made by a Mr. Kalbfus, Johnson's Director of Sales, and three levels above Mr. Schiavina in the Johnson hierarchy (Pl. Ex. 46, P.A. 119).

cury terminated his franchise against his wishes (see Def. Ex. 49, P.A. 150).[8]

25. Insofar as Schiavina's personal conduct is concerned, the net result was that he had recommended the non-renewal of a dealer's Johnson franchise because (according to the courts below) the dealer was also handling Mercury, and he had simultaneously recommended that the same Johnson franchise be given to another dealer who was handling Mercury. In evaluating this conduct it should be borne in mind that in the early months of 1961, before petitioner had taken on the Mercury motor, Schiavina had become thoroughly dissatisfied with petitioner on the basis of its "squalid" condition, customer complaints, and financial irresponsibility; that before taking on Mercury petitioner had already been spreading its selling energies and financial resources over a vast array of products (Def. Ex. 19, R.A. 129; R.A. 58); and that the addition of still another line (Mercury) might well have tended to reduce the effectiveness of petitioner as a sound Johnson dealer—while Gates had been a fine dealer who had demonstrated an ability to sell 500 outboard motors a year.

26. There is no specific evidence in the record as to the number or proportion of respondent's dealers that in fact dealt in competitive motors, except with respect to respondent's Johnson dealers in its Territory 23,

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[8] The implication in the Petition (p. 7) and in the Government's Memorandum (pp. 2-3) that respondent somehow persuaded Gates to get rid of the Mercury motor is totally without foundation and is in fact refuted by affirmative proof (Def. Ex. 49, P.A. 150). When petitioner persisted in implying, during the trial, that respondent had forced Gates to relinquish the Mercury franchise, the District Court expressly invited petitioner to use compulsory process to elicit Gates' testimony as to why he had ceased to be a Mercury dealer, but petitioner refused (Tr. 837-39; see Pet. B-5).

the territory in which Messrs. Wright and Schiavina successively served as district manager. There, of the approximately 100 Johnson dealers in the territory (R.A. 63), ten dealt in competitive motors (R.A. 59; P.A. 91-93), a fact which was known to respondent's management and to which that management made no objection (R.A. 57; and see, *e.g.;* Pl. Exs. 62-64, R.A. 200-03; Def. Exs. 4-7, R.A. 88-92; Def. Ex. 46, P.A. 147; Def. Ex. 50, P.A. 151).[9]

27. The petitioner strongly suggests—and the Government's memorandum states flatly—that all of the Johnson dealers who dealt in competitive motors "were in rural areas where substitute dealers were hard to find" (Gov. Mem. 3; see Pet. 9). This is not a responsible reading of the record. Of the ten dealers who handled competitive motors in Territory 23 in the relevant period, only three were shown to be located in rural areas (P.A. 80-81, 96, 97). As to the other seven, either the record does not show the character of the area (*i.e.,* rural vs. urban), or it shows that the particular dealer was located in an urban area (P.A. 96, 97).

28. Mr. Wright testified that during his several years in respondent's employ (P.A. 57) there were eight occasions when he approached a dealer who was handling competing motors and suggested that the dealer cease handling the competing motor and concentrate entirely on the Johnson motor (P.A. 65-75). There is

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[9] During Mr. Wright's tenure in Territory 23, six of his dealers were handling competing motors (P.A. 66, 71, 77, 78, 91, 92, 94-95; R.A. 59). When Mr. Schiavina succeeded Mr. Wright in Territory 23, the Johnson Division added four more such dealers on Schiavina's recommendation (P.A. 91-92, 147), thus bringing the total number of dealers who were handling competing motors in the territory to ten.

not the slightest suggestion in the record that on any of these occasions Mr. Wright "threatened" that, if the dealer continued to handle competing motors, the Johnson Division would refuse to deal with him.[10] Moreover, Mr. Wright's suggestions were not notably successful. In three of the eight cases the dealer accepted the suggestion and gave up handling the competing motor (P.A. 65-67), but in the other five cases the dealer flatly refused to give up his competing line of engines and continued to handle them as before (P.A. 65-74). There is no suggestion in the record that, when such refusals occurred, any retaliation was forthcoming from Mr. Wright or anyone else.[11]

29. During his testimony with respect to his eight efforts to persuade a dealer to stop handling competing motors, Mr. Wright (and, indeed, counsel for petitioner) made very clear that at the time Wright made these efforts respondent's policy prohibited discrimination against dealers handling competing motors, that his suggestions that particular dealers give up handling competing motors constituted deviations from his instructions from his superiors, and that none of his efforts to persuade dealers to handle respondent's

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[10] Petitioner's offer of proof included proffered testimony that in 1959 a former employee of the Johnson Division approached a Philadelphia dealer and "demanded that they cease handling a Neptune outboard motor", a "low priced, small horsepower specialty product" (P.A. 109-10). The proffered testimony did not include any testimony as to a threat of cancellation or as to the circumstances surrounding the "demand".

[11] Compare petitioner's erroneous statement that Mr. Wright testified that "he had personally recommended cancellation of a number of dealer franchises for the sole reason that the dealer refused to give up a competing line of outboard engines, PA63 [and 64-65]" (Pet. 7). The statement is untrue; there is no evidence to that effect either at the cited pages or elsewhere.

motors exclusively was known to any of his superiors (P.A. 65-72).

3. Petitioner's Theories of Violation and the Findings of the Courts Below

In the District Court and the Court of Appeals below petitioner rested its entire case on the Sherman Act. Not only did petitioner not assert any claim under Section 3 of the Clayton Act, but when the Court of Appeals referred to the latter statute in its opinion, petitioner objected, characterizing the Court's discussion of Section 3 of the Clayton Act as being "irrelevant".[12] In this Court petitioner makes brief reference to Section 3 of the Clayton Act (Pet. 20), but in the courts below it affirmatively eschewed any such theory of liability.

With respect to its theory under Section 1 of the Sherman Act, petitioner's position has undergone a series of changes. In its Complaint its Section 1 position was that respondent and certain dealers in the Baltimore area had conspired together to put petitioner out of business as a Johnson dealer (P.A. 3), but proof was lacking and the charge was dropped.[13] Then in its final argument to the District Court, after it had completed its evidentiary submission, petitioner began to talk in terms of a "combination" between respondent and its dealers generally with respect to the handling of competing motors, citing *United States* v. *Parke, Davis & Co.*, 362 U.S. 29 (1960).[14] Apparently recog-

[12] Petition for Rehearing to the Court of Appeals (p. 12).

[13] This Section 1 theory was never mentioned in the Court of Appeals and has necessarily been abandoned.

[14] See "Plaintiff's Memorandum" filed in the District Court on April 4, 1966 (p. 23), and Petitioner's Brief in the Court of Appeals (pp. 21-31).

nizing, however, that it had not proved or offered to prove such a "combination", petitioner simultaneously insisted before the District Court that "the thrust" of its case was not a violation of Section 1 but was "a Section 2 offense" (Tr. 766; see also Tr. 761, 768, 835). Finally, in the Court of Appeals petitioner decided to reassert its *Parke, Davis* theory as well as its charges under Section 2.

Despite the somewhat confusing fluidity of petitioner's position, both of the courts below nevertheless accepted as true all of the factual propositions presented by the plaintiff, both in the form of evidence and in the form of the proffer of proof.[15] Having accepted these factual propositions as true, the question then was whether they established any of the ultimate facts ("combination or conspiracy", "intent to achieve a monopoly", etc.) which would give rise to Sherman Act liability.[16] The District Court found as a fact that none of the requisite elements of liability were present, and the Court of Appeals explicitly concurred in those

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[15] The Government is simply wrong in its unspecific statement that the Court of Appeals below "refus[ed] to treat as true . . . the facts set out in petitioner's offer of proof" (Gov. Mem. 6 n. 12). No evidence proffered by petitioner was treated as untrue by either of the courts below.

[16] The Government is wrong in suggesting that, once the District Court had taken as true "all of the relevant facts in the offer of proof", the courts below were then required to draw "all inferences favorable to petitioner . . . from such facts" (Gov. Mem. 2). Fed. R. Civ. P. 41(b) makes clear that in a case "tried by the court without a jury", if the defendant moves for dismissal at the close of the plaintiff's evidence on the ground that the plaintiff has failed to make out a case, "[t]he court as trier of the facts may determine them", weighing the evidence and drawing inferences as at the conclusion of the case. See Notes of Advisory Committee, Rule 41(b), 28 U.S.C.A., p. 205 (1958 ed.). This is exactly what was done by the District Court below.

findings. The ultimate facts as thus concurrently found by both courts are, in summary, as follows:

(a) There was no "combination" or "conspiracy" among the respondent and its dealers (or anyone else) so as to give rise to liability under Section 1 of the Sherman Act, either under a *Parke, Davis* theory or otherwise (Pet. B-1-2, A-6). As observed by the Court of Appeals, there simply was no "joint or concurring action" among respondent and its dealers so as to bring the case within the *Parke, Davis* doctrine (Pet. A-8).

(b) Similarly, both the District Court and the Court of Appeals found that there was no conspiracy to monopolize under Section 2 (Pet. B-2, A-6).

(c) Both courts found that there was no evidence to show that respondent enjoyed monopoly power (either the ability to fix prices or to exclude competition) or that respondent had done any act tending to strengthen its alleged monopoly position (Pet. B-3, B-4, A-6).

(d) With respect to petitioner's theory that there had been an "attempt to monopolize" in violation of Section 2, both courts found that there was no specific intent to monopolize and that if there had been such intent, there was no dangerous possibility that the attempt would be successful (Pet. B-8-11, A-6).

There is one additional factual issue which was considered by the Court of Appeals but not by the District Court—namely, whether respondent had entered into arrangements with its dealers with respect to their handling of competing motors in such a way as to raise a question under Section 3 of the Clayton Act. The

District Court did not consider the issue because petitioner never raised any Section 3 question at the trial level. The Court of Appeals considered the issue *sua sponte* but concluded that, since there was no evidence of any "joint or concurring action" between respondent and its dealers with respect to the handling of competing motors, there was no factual basis for a finding of a violation of Section 3 (Pet. A-8).

It should be emphasized that in this Court petitioner does not quarrel with any of the substantive principles of antitrust law applied by the courts below. As will fully appear from the following analysis, petitioner's only disagreement with the courts below is that it disagrees with their concurrent findings as to the facts.

REASONS FOR THE DENIAL OF THE WRIT

I. THE ANTITRUST QUESTION FOR WHICH PETITIONER SEEKS REVIEW IS NOT PRESENTED ON THIS RECORD

A quick reading of the first "Question Presented" by petitioner might leave the impression that this case involved significant new questions of antitrust law. The fact of the matter, however, is that although that "question presented" may be interesting in terms of abstract theory, it is not raised by the record in this case. The "question" contains a major premise and five subsidiary provisions, but, as demonstrated immediately below, nothing in the record supports either the premise or any of the subsidiary points. (The Government's view of the case will be discussed separately in Part II, pp. 28-34, *infra*.)

Petitioner's premise is that the case involves a manufacturer who has made it a practice "to cancel the franchises of dealers who refuse to stop selling the

products of competing manufacturers" (Pet. 2). At other points the alleged "practice" (Pet. 19) is described as an "exclusive dealing policy" (*e.g.*, Pet. 10, 12, 18) embodied in "oral understandings with the majority of its 8,700 dealers" (Pet. 20) with respect to their handling of competing products. The theme, in other words, is a pattern of conduct permeating respondent's relations with its dealers generally, all for the purpose of "systematically preventing" such dealers from handling competing products (Pet. 10-11).

Given the state of the record, these are extraordinary claims. Witnesses called by the petitioner itself established that respondent's policy, as practiced by its management and directed to its employees, was *not* to discriminate against dealers who handled competing products (Def. Ex. 9, P.A. 142; P.A. 77-78; R.A. 56-57), and it was also established that, when one of respondent's former salesmen tried to persuade a few dealers to give up competing products (unsuccessfully in five out of eight cases),[17] he was knowingly violating his orders and did not tell his superiors of the violation (P.A. 69-72; R.A. 61-62). There was not a shred of evidence that respondent had "oral understandings with the majority of its 8,700 dealers" on the subject of competitive products or on any other subject.

Nor was there any practice on the part of respondent "to cancel the franchises of dealers" for any anticompetitive reason. In this connection it should be noted that petitioner had available the names and addresses of a veritable army of persons who for one reason or another had dropped out of respondent's dealership

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[17] See p. 17, *supra*.

organization before the trial,[18] and it may be assumed that substantial numbers of these persons were available to give evidence as to the reasons why they ceased to be respondent's dealers. Yet petitioner proved and offered to prove, at best, only a *single cancellation* of a single dealer—namely, the petitioner itself. On the record this is simply not a case involving any general practice on the part of a manufacturer.[19]

Turning to subsidiary proposition (a), it is alleged that one of the effects of this non-existent general practice was to "preserve the manufacturer's approximately 60% share of its national market." Assuming the validity of the percentage figure (see P.A. 98-101), there is no evidence that anything like the alleged practice had any effect on the manufacturer's market share.[20]

Subsidiary proposition (b) is that one effect of the alleged practice was to "exclude competing manufacturers from approximately 8,700 (or some 58% to 72%) of the estimated 12,000 and 15,000 retail outlets in the country". The allegation is purest fiction. To begin with, petitioner never proved nor offered to prove

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[18] In answer to an interrogatory of petitioner, respondent furnished the names and addresses of approximately 4,000 persons who ceased to be dealers in respondent's products in the period 1959-1965.

[19] Both of the courts below concurrently found as a fact that this record shows only "a single instance" of a refusal to deal on the part of respondent (Pet. B-11, A-6).

[20] See also the petition's surprising assertion that "there is no serious dispute here that this exclusive dealing policy has the straight-forward effect of enhancing the sales volume (and market share) of the defendant and shrinking that of its competitors" (Pet. 12-13). There is no evidence that such an "exclusive dealing policy" exists or that it has had any "effect" on sales or market share, "straight-forward" or otherwise.

how many of respondent's "approximately 8,700" dealers handle competing products and how many do not.[21] It was established that in a single geographical area encompassing about 100 dealers, ten handled competing products without objection from the respondent, but there is no data whatever as to the remaining 8,600. Indeed, neither during pretrial discovery nor at any other time did petitioner ever *ask* for such information.

In view of the fact that a majority of all marine dealers handle only a single line of engines (Def. Ex. 9, P.A. 142), there can be no doubt that the majority of the respondent's dealers do the same, but there is nothing to show that this is because competing engines have been "excluded" by some action of the respondent.[22] On the contrary, there is evidence in the record that the personal preference of most dealers is to handle only one line of engines (Def. Ex. 9, P.A. 142) (presumably to reduce the expenses of inventorying motors and spare parts, to reduce training costs for service employees, etc.) and that respondent's management has no objection to a dealer's handling a competing engine (P.A. 76-78; R.A. 59-62, 64).

Nor is there anything to show that some conduct on the part of respondent has had the effect (as further

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[21] For this reason there is no evidence to support petitioner's statement that respondent's "8,700 marine dealers . . . are operating under similar exclusive dealing arrangements" (Pet. 21).

[22] The petitioner also says that "Mercury and Scott" have been "excluded from any significant share of the local market", referring to "the Maryland area" (Pet. 8), but the statement is misleading in several respects: (1) the cited testimony (P.A. 116-17) says nothing about the "share of market", in terms of sales, of either Scott or Mercury; (2) the testimony relates only to one small part of the State of Maryland; and (3) there is no testimony as to Mercury and Scott having been "excluded" by respondent, even with respect to that small part of Maryland.

suggested in Question 1(b)) of "stifling the growth of existing competitors and creating severe cost and price barriers against the entry of new manufacturers." Although the necessary market-share and financial information might well have been available through compulsory process, the petitioner never even sought to obtain or offer any evidence with respect to the market shares or the "growth" of existing competitors or with respect to costs and prices in the industry. The concept of "barriers" to new entry apparently occurred to petitioner some time after its loss in the court below; it was certainly never mentioned at any time before the filing of the present petition. The suggestion is without any evidentiary basis, and if its truth or falsity were now at issue, it would soon become apparent that it is factually wrong.[23]

Next it is suggested, in Question 1(c), that respondent, through its alleged cancellation practice, has created a "noncompetitive market structure at the dealer level in virtually every local market in the United States." These are resounding words, but there was no evidence as to the market structure in *any* local market in *any* part of the country.[24] It is also said

[23] Although the fact is not in the record, respondent will take the liberty (in view of the liberties taken by the petitioner) of referring the Court to current issues of popular boating magazines in which a new entrant, Chrysler Corporation, is advertising its new line of outboard motors. See, *e.g.*, Yachting Magazine, October, 1967, at 46.

[24] The petitioner also asserts that in the relevant market the factor of "product differentiation" so operates that respondent may "charge a substantially higher price than can be gotten by others for products of comparable quality" (Pet. 10). There is not a shred of evidence of such "product differentiation", and there is equally little evidence that respondent obtains a higher price for its products than do others.

in effect (in Question 1(d)) that respondent has brought about the "ruin" of "the larger dealers who attempt to sell a competing product", and yet petitioner never offered to show that respondent had ever "ruined" anyone. All the evidence shows is that a single outboard motor dealer (the petitioner) lost its Johnson motor franchise and that that dealer's business subsequently declined—and there was evidence that the decline was the result of a host of factors unrelated to the respondent.[25]

Finally, it is suggested in Question 1(e) that the respondent has somehow managed to "impose on the consuming public a supercompetitive price for the

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[25] Contrary to petitioner's assertion (without record citation) that "plaintiff's business promptly collapsed with the withdrawal of the 'Johnson' franchise" (Pet. 6), petitioner had greater business success the year after the non-renewal of its franchise than it did while it was handling the Johnson motor (P.A. 40; R.A. 41). Thereafter its business gradually declined but for a number of unrelated reasons, including the following: (1) on the day petitioner's Johnson franchise expired, another supplier (the manufacturer of the well-known "Boston Whaler" boat) cancelled petitioner's boat franchise (Def. Ex. 24, R.A. 152); (2) in 1962 petitioner lost its Scott motor franchise (R.A. 41); (3) in 1963 it lost its franchise for its largest line of boats (Def. Ex. 40, R.A. 184); and (4) in 1965 it lost its franchise for Mercury motors (R.A. 49). Significantly, from 1961 until 1966, when repeatedly asked by stockholders and creditors why its business had declined, Mr. Canzona repeatedly explained that in mid-1961 the marine retail industry generally had gone into an economic recession, that marine dealers generally were suffering lost sales and lost profits, and that petitioner was suffering with the rest (Def. Exs. 29-31, R.A. 153-57). It was not until the time of trial that petitioner decided that the loss of the Johnson franchise was the sole cause of its troubles. In view of these circumstances little weight should be given to the Government's flat statement (p. 3) that "as a result of the loss of respondent's franchise, petitioner's business failed."

product, one that exceeds the level that would be expected to prevail in an effectively competitive market by perhaps as much as 15%".[26] Again, the phrases are resounding but without the slightest evidentiary basis. The petitioner never proved or offered to prove the prices of any of the various outboard motors on the market, let alone the proposition that the respondent charged "supercompetitive" prices.[27]

In sum, petitioner's first "Question Presented" leaves one strong impression—namely, that after the court below had finally disposed of its case, petitioner did some hasty reading in the economic field and constructed a group of hypothetical economic propositions for which there is no evidentiary basis in the record. Of course, these economic theories had been advanced

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[26] The petitioner also hypothesizes that respondent enjoys monopoly profits as a result of charging monopoly prices for its outboard motors, and tries to support this thesis by certain computations as to the profits earned by respondent's multi-product business (Pet. 15). In fact there is nothing in the record as to the profits earned by respondent on its outboard motor business. Moreover, although a demonstration that petitioner's computations are entirely misleading would require an unduly lengthy discussion here, it may be noted that during the time petitioner was dealing with respondent the latter's after-tax earnings averaged 9.9% as a percent of stockholders' equity and 5.45% as a percent of sales and that in subsequent years respondent's average profit rates declined (OMC Annual Reports, Pl. Ex. 71, Tr. 628). Even under petitioner's own economic theory (Pet. 15 n. 17) such profit rates "could not be identified as supernormal".

[27] On a related theme petitioner repeatedly asserts that respondent charges 15% more for its Johnson and Evinrude engines than it does for its Gale engine (see, *e.g.*, Pet. 11, 12). There is no evidence to that effect. However, there is evidence that the Gale motor was sold under a private brand ("Sea King") to Montgomery Ward (P.A. 52) which would of course explain a price differential if one existed.

elsewhere some years before the trial of this case in 1966,[28] and if petitioner had wished to raise such issues, it had an ample opportunity to do so. The simple facts are that petitioner did not even attempt to litigate these issues, that they are not presented by this record, and that this case is not a vehicle for their review by this Court.

II. THE QUESTION FOR WHICH THE GOVERNMENT SEEKS REVIEW IS NOT PRESENTED ON THIS RECORD

The Government's view of this case, although based upon some of the same erroneous factual impressions set forth in the petition for certiorari, differs from petitioner's view as to the applicable statutes. Petitioner repeatedly told the courts below that "the thrust" of its case was an offense under the monopoly provisions of Section 2 of the Sherman Act,[29] but the Government apparently sees no substantial Section 2 question in this case.[30] The Government's position here is that respondent engaged in a violation of Section 1 of the Sherman Act, although not the type of violation which petitioner attempted to prove in the District Court,[31] and that respondent also violated Section 3 of the Clayton Act, although petitioner in the courts

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[28] See petitioner's reliance upon Bain, *Barriers to New Competition* (1956); Bain, *Industrial Organization* (1959); Kaysen and Turner, *Antitrust Policy* (1959) (Pet. 11-15, etc.). See also Commissioner Elman's opinion in Procter & Gamble Co., [1963-1965 Transfer Binder] Trade Reg. Rep. ¶ 16,673, at 21,560 (FTC 1963).

[29] See pp. 18-19, *supra*.

[30] Literally the Government "express[es] no view" as to the applicability of Section 2 (Gov. Mem. 6 n. 12), but the implication is reasonably clear that the Government has found no Section 2 problem which deserves consideration by this Court.

[31] See p. 18, *supra*.

below treated the latter statute as "irrelevant" (see p. 18, *supra*). Because of these differences the Government's thesis deserves separate treatment.

The Government's memorandum starts from the factual premise that as a matter of practice respondent has made "demands" on its dealers generally to handle respondent's motors exclusively. It is said that "dealers have acquiesced in respondent's exclusivity demands" (Gov. Mem. 3), so that there has been "tacit acquiescence of distributors in exclusive dealing arrangements" (*id.* at 4), thus creating "an anticompetitive program embodied in tacit agreements with acquiescent dealers" (*id.* at 10).

The motivating force, it is said, which has prompted respondent's dealers "to fall in line" with this "unlawful program" is "*threats* of refusals to deal" (*id.* at 4, 12): "respondent has threatened dealers with the termination of their franchises for failure to deal exclusively with respondent" (*id.* at 7). In addition we are told that occasionally, when an "intractable dealer" has refused to knuckle under to the "threats", he has been "cut off as an example to others" (*id.* at 4). Indeed, it is said that respondent's refusal to renew petitioner's franchise was a warning to other dealers: it "necessarily indicated to other dealers that respondent's threats of cancellation for handling competing products were to be taken seriously, and thus tended to insure continued acquiescence in respondent's exclusive dealing arrangements" (*id.* at 9). Such were respondent's methods, the Government says, and *"the question presented here"*, therefore, is whether a cancelled dealer has a "right to relief against . . . a supplier . . . who uses refusal to deal as a means to secure

compliance with an anticompetitive program embodied in tacit agreements with acquiescent dealers" (*id.* at 10).

Such is the Government's theory; now let us get back to the record. It simply does not support the theory. In the context of an organization of 8,700 dealers, the relevant *evidence* is as follows: that throughout respondent's history, in the course of the thousands of conversations between respondent's salesmen and its 8,700 dealers, there were *two* occasions on which a salesman "demanded" that a dealer deal exclusively;[32] that such demands violated the salesman's instructions;[33] that neither of the two dealers acquiesced in the unauthorized demand;[34] that on eight other occasions a single salesman, Mr. Wright, who has long since left respondent's employ, deviated from company policy by suggesting that a dealer discontinue a competing line of engines; that on three of the eight occasions the dealer followed this unauthorized suggestion; and that on five of the eight occasions the dealer refused to deal exclusively in Johnson engines and suffered no adverse consequences.[35] Although the Gov-

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[32] In view of the findings of the courts below, Mr. Schiavina's conversations with petitioner with respect to Mercury engines should presumably be regarded for present purposes as a "demand" for exclusive dealing (although Mr. Schiavina never mentioned the Scott line of engines still being handled by petitioner). The only other such "demand" shown by the record was that made by a Mr. Jonas, a former sales representative of respondent (see p. 17 n. 10, *supra*).

[33] It was established by Mr. Wright, a former employee of respondent, that such demands violate company policy (P.A. 65-72).

[34] Petitioner refused to give up the Mercury engine, and the Philadelphia dealer to whom Mr. Jonas made his "demand" continued to handle competing engines (P.A. 110).

[35] See p. 17, *supra*.

ernment talks in terms of multiple "threats" designed to keep respondent's dealers generally "in line" with an unlawful "program", the *only threat* of cancellation shown in this record is the alleged threat against the petitioner, and if any "intractable dealer" has been "cut off", the *only* one is petitioner.[36] Moreover, in response to the Government's hypothesis that "cut-offs" have been used as warning "examples" to others, the answer is that the only "cut-off" in the case is the cut-off of petitioner and that *both* courts below explicitly found that it was *not* done or used as a warning to others.[37]

So much for the "demands", "threats", and "examples". What then does the record show as to the Government's hypothetical "tacit agreements" between respondent and its dealers—the bricks and mortar of the alleged "anticompetitive program"? With 8,700 dealers involved, and with 4,000 former dealers available to give evidence,[38] the record shows, at best, the possibility that *three* dealers entered into such tacit agreements—and that all three arrangements were

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[36] See p. 23 n. 19, *supra*.

[37] The District Court's finding was as follows:

> "The argument is made to me that this [*i.e.*, petitioner's situation] would be a good example for Outboard to cite to its other dealers . . . to exert all sorts of pressures on them . . . to carry on exclusive dealing . . . but I think the answer to that is that there is not the slightest proof that this is what . . . [was] done." (Pet. B-9)

The Court of Appeals made the same finding:

> "[T]here was no evidence that the disenfranchisement of Amplex was held out threateningly as a deterrent to other dealers . . . ." (Pet. A-6)

[38] See pp. 22-23 and n. 18, *supra*.

made by a salesman who has admitted that he was acting in violation of his instructions and without his superior's knowledge. Thus the Government's "unlawful program" consists, at best, of *unauthorized* "tacit agreements" involving less than four one-hundredths of one percent of respondent's dealer organization. Again, this is simply not a case involving a general policy or program or course of conduct or concerted action between a manufacturer and its dealers.[39] *Cf. United States* v. *Parke, Davis & Co.*, 362 U.S. 29 (1960)

There is one additional factual point in the Government's Memorandum that deserves attention—namely, the suggestion that the record in this case shows that respondent's conduct "produced a sufficiently serious foreclosure of outlets to respondent's competitors to establish the requisite anticompetitive effect under either Section 1 of the Sherman Act or Section 3 of the Clayton Act" (Gov. Mem. 7). Apparently recognizing that an "exclusive dealing policy" (if one existed) could not be held to violate either statute in the absence of some showing of anticompetitive effect, the Government treats this record as demonstrating that for the purposes of the Sherman Act respondent's conduct has unreasonably restricted the opportunities of its com-

[39] The Government's approach to the factual issues in this case, including the key factual issue of whether respondent engaged in an anticompetitive program, is strangely at odds with the principles governing appellate review of lower courts' findings of fact. The Government urges that the evidence below "would justify" findings contrary to those made by the courts below (Gov. Mem. 7), whereas the only proper inquiry (if the facts are to be reviewed at all) is whether the courts below plainly erred in their findings.

petitors in the market place [40] and that for the purposes of the Clayton Act respondent's conduct might substantially lessen competition or tend to create a monopoly.[41]

These are remarkable contentions. According to petitioner (Pet. 8, 11), there are somewhere between 12,000 and 15,000 marine dealers in the United States, and the total evidence of "foreclosure" is that in 1958 a Johnson salesman persuaded a dealer to stop handling the so-called "West Bend" motor, that at some unknown time another dealer was persuaded to give up the so-called "Champion" motor, and that on a third occasion a dealer was persuaded to "phase out" the Scott motor—all of such persuasive efforts being contrary to the salesman's instructions (P.A. 63-67).[42] With 12,000 to 15,000 dealers in the market and *no evidence* as to the position which any of the three specified motors enjoy as among the 12,000-15,000

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[40] See United States v. Columbia Steel Co., 334 U.S. 495, 524 (1948).

[41] Compare, however, the Government's astonishing statement that the question of anticompetitive effect "is not before this Court" (Gov. Mem. 7 n. 13). The Government is asking, implicitly but clearly, for a reversal of the decision below because of alleged violations of both of the above-mentioned statutes, and obviously a reversal on such grounds would be appropriate only if the record contains a *prima facie* showing of the necessary anticompetitive effect. Even the petitioner here concedes that it had the burden of proof on this issue and that it cannot prevail here unless it successfully carried that burden in the District Court below (see Pet. 10 n. 10).

[42] The Government quite properly does not suggest that respondent's non-renewal of petitioner's Johnson franchise had an anticompetitive effect on the Mercury motor. The Johnson franchise was simply shifted from one Mercury dealer to another, leaving Mercury's position unaffected.

dealers, it is simply unbelievable that the evidence of these three unauthorized events constitutes a showing of the anticompetitive effect required by Section 1 of the Sherman Act and Section 3 of the Clayton Act.

Finally, it may be appropriate to observe that there is no justification for the Government's suggestion that the Court of Appeals declared and applied in this case a legal principle of broad application that will adversely affect the proper enforcement of the antitrust laws. The Government apparently believes that in this and other cases in the Fourth Circuit there has been laid down an absolute rule that, even where a manufacturer has established an anticompetitive exclusive dealing program among its dealers generally, a dealer who is cancelled because he will not participate in the program *never* has a right to treble-damage recovery. It is submitted, however, that the decision below does not rest on any such broad basis. Both in the opinion below (Pet. A-8), and in *Osborn* v. *Sinclair Refining Co.*, 324 F. 2d 566 (4th Cir. 1963), cited in the opinion below, the Court of Appeals recognized that, if such a joint program between a manufacturer and its dealers exists, a cancelled dealer may in certain circumstances have a cause of action for damages. The Court's affirmance of the District Court here was based on the lack of evidence of "joint or concurring action" in the form of exclusive dealing arrangements between respondent and its dealers. It was, said the Court, the "absence" of any "such additional circumstance" that "destroys the actionability" that might otherwise exist under *Osborn* (Pet. A-8). In short, the Government's concern about the state of the law in the Fourth Circuit would seem to be unwarranted: when an antitrust violation occurs, those who may be injured will be protected in the Fourth Circuit.

III. THERE IS NO NOTEWORTHY QUESTION OF PROCEDURE HERE INVOLVED

Petitioner's second "question presented", relating to the procedure used by the District Court, is also based upon misstatements of fact and law. The wording of the petition is clearly intended to suggest that petitioner was "required" against its will to substitute a proffer of proof for direct evidence (see Pet. 3, 6, 23). In fact the trial court made clear that the petitioner was free to proceed with its entire case if it wanted to do so; moreover, petitioner wholeheartedly accepted the Court's suggestion for a possible shortening of the trial (see p. 6, *supra*).[43] Thereafter both courts below accepted as true all of the basic facts to which reference was made either in petitioner's direct proof or in its proffer.[44] Although the District Court was not obliged to draw all inferences from those basic facts in a manner favorable to petitioner,[45] it leaned over backwards to do so and still could not find an antitrust violation. The concurring findings of both courts below that there was no such violation should be accepted by this Court.

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[43] In view of the fact that the case went to trial and that petitioner was offered an opportunity to put in all of the evidence that it wanted, petitioner's reliance upon Poller v. Columbia Broadcasting Company, 368 U.S. 464 (1962), and Continental Ore Co. v. Union Carbide & Carbon Corp., 370 U.S. 690 (1962), is misplaced. Unlike the situations in *Poller* and *Continental Ore*, the procedures used in this case did not raise any such questions as deprivation of the right to a jury trial or the resolution of factual issues on the basis of affidavit testimony which has not been tested by cross-examination.

[44] See p. 19 n. 15, *supra*.

[45] See p. 19 n. 16, *supra*.

CONCLUSION

For the foregoing reasons the petition for a writ of certiorari should be denied.

Respectfully submitted,

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In the

SUPREME COURT OF THE UNITED STATES

October Term, 1967

No. 668

AMPLEX OF MARYLAND, INC.,

Petitioner,

v.

OUTBOARD MARINE CORPORATION,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

REPLY TO RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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TABLE OF CONTENTS

INTRODUCTORY STATEMENT 1
DISCUSSION OF FACTS 2
CONCLUSION 10
APPENDIX C 11

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INTRODUCTORY STATEMENT

It is of course unnecessary to reply in kind to defendant's many suggestions that plaintiff and the Solicitor have misread the record. With one hardly critical exception—the statement that defendant's "private brand" engine, the "Gale" sells for approximately 15% less than its technically identical "brand" engines, the "Johnson" and "Evinrude" motors (plaintiff has bought both the Gale and the Johnson and hence has invoices showing their respective prices)—plaintiff is satisfied it can demonstrate that every factual statement

in its Petition is supported in the record by evidence either received or proffered.

It is of course also unnecessary to state that the Government, before reaching its decision to file an "amicus curiae" brief, under the name of the Solicitor General, examined the record to be certain that the factual recitation in its brief was supported by the evidence.

DISCUSSION OF FACTS

In the present posture of this case, defendant's emphasis on what it chooses to call the "facts" is misplaced: the central point in plaintiff's petition is that it has not yet had an *opportunity* to put in its factual evidence, that the courts below have denied it a full hearing on the merits, a chance to fill in the bare skeleton of ultimate facts outlined in its proffer of proof. The question before the Court is not whether the allegations in plaintiff's complaint and the summary of documents and testimony in plaintiff's proffer have all been established as "facts"; the question, rather is whether those allegations—and summaries—if *ultimately established as true* (as must be assumed for the present purpose of considering the district court's summary dismissal of the case)—constitute a violation of law.

Central to the plaintiff's case are four factual propositions, three of which plaintiff either introduced or proffered evidence and which were unambiguously accepted as facts by both of the lower courts.

1. Defendant Outboard Marine has some 60% of the national market in outboard motors, a $155 million dollar industry in 1961.

2. Plaintiff Amplex was defendant's largest dealer in the State of Maryland (out of about 76 such dealers in the State as well as out of the approximate 104 dealers in territory number 23).

3. Defendant cancelled the dealership of plaintiff Amplex *for the reason that* plaintiff took on, and refused to stop

handling, a competing manufacturer's engines, the "Mercury" engines.[1]

A fourth important proposition, although denied here by defendant, has been prima facie established by the evidence received and proffered:

4. The termination of plaintiff's dealership was part of an "unofficial policy" of defendant's to impose exclusive dealing on its some 8,700 dealers to prevent them from handling the engines of competing manufacturers, and that this policy has had the *effect* of maintaining a noncompetitive market structure in the industry and thus of injuring competition.[2]

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[1]The district court said: "Of course, there is the proof, which I accept for the purposes of this stage of the proceedings, that the plaintiff's franchise was not renewed *for the invidious reasons* of Mr. Schiavina (defendant's salesman), namely, that this was done to exclude Mercury as one of the products which the plaintiff handled . . ." (Appdx. B-4, emphasis added). The court of appeals, after reciting the July visit of defendant's salesman to plaintiff's place of business and his "protest" to plaintiff about taking on the Mercury line, said that: "Later, in August or September 1961, this representative advised Amplex that Outboard would not renew its dealership because of Amplex's agency for Mercury . . ." (Appdx. A-5, emphasis added)

[2]The defendant repeatedly asserts in its brief in opposition to certiorari that the evidence affirmatively establishes that it had a policy of not discriminating against dealers who sold competing engines. First, this is rebutted by the testimony of Paul Wright as hereinafter set forth, by the proffered testimony relating to pressures and threats made by other representatives of the defendant to dealers who desired to sell competing engines (reproduced in this Reply Brief as Appendix C) and by the very act giving rise to this action—the refusal to deal with its best customer in the State of Maryland solely because of an involvement with a competing engine, minor as it was (12 engines on consignment).

The support for the defendant's allegation to this effect is found in DX 9, PA 142, a statement written by the Johnson management. The platitude "actions speak louder than words" seems particularly appropriate.

Propositions 2 and 3 are closely related: the fact that plaintiff was the largest of defendant's approximately 76 dealers in the State of Maryland is, plaintiff believes, an adequate answer to defendant's persistent dragging in of charges, that the real reason for the cancellation was an alleged lack of tidiness[3] on plaintiff's part. As Lincoln is said to have replied to an attack on Grant's alleged lack of sobriety: "Tell me what brand he drinks so that I can send some to my other generals." Plaintiff bought 194 engines from defendant Outboard in 1961, for $85,000, or some 40% more than defendant's 2nd largest dealer in the State (177 engines, for $60,048).[4] Plaintiff paid cash for all of them. (Amplex

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[3]The charge of financial irresponsibility is similarly ill-founded. In the first place, defendant Outboard accepts no credit orders (dealers must pay in cash, *prior* to delivery) and hence runs no credit risks with its dealers. Further, it was proffered that a Mr. Robert Ewart, sales representative of Lone Star Boat Company, a major supplier of plaintiff, would testify if called that "he knew Amplex to be among the top outboard boat and motor dealers in the country in every respect: . . . that during his association with Lone Star, Amplex never had more than minor financial problems with the (Lone Star) Boat Company and that in many instances the disputes involved shortcomings on Lone Star's part; that subsequent to the loss of Amplex's Johnson franchise, he experienced grave concern for the company, realizing from his background and his experience that such a setback and loss would, of necessity, result in a sales decline of Lone Star boats and severely curtail public acceptance." (PA 103, emphasis added) Similarly, it was proffered that a representative of a prominent marine distributor would testify, if called, "that Amplex was one of the biggest and best accounts of the Whiting Company in 1961 and that its payments of account were satisfactory in relation to its growth and volume; that the volume of marine supplies and purchases and accessories purchased by Amplex rapidly increased from $400 in 1956 to $21,000 in 1961 and back down again to $500 and $600 in 1965." (PA 104)

[4]Defendant's reference to the alleged sales of 500 engines by another dealer many years ago is misleading. In the first place, the source of that figure is a sales report filed by Schiavina, defendant's salesman, in support of his recommendation that plaintiff be cancelled and this other dealer (located some 10 miles from plaintiff) be fran-

purchased over 373% more engines from Outboard Marine in 1961 than did 56 other Johnson, Evinrude and Gale dealers in Maryland. (PX 55-57, PA 122-32) On this question of plaintiff's alleged shortcomings as a dealer, it was proffered that a Mr. Robert J. Robichaud, a member of a New York University School of Retail Research team employed by the Outboard Boating Club (an industry trade association) to make a detailed survey of the retail marine market throughout the United States, would testify if called that he had visited and studied the operation of numerous marine dealers throughout the country and that "in the summer of 1960, he personally interviewed the principals of Amplex and subjected the Amplex dealership to a most

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chised: "At one time they were selling over 500 Evinrude motors until they had a misunderstanding. This was 5 to 10 years ago and I do hope they can do the same for Johnson Motors now." (PA 148) The year 1959, for example, was the one in which the outboard motor industry reached its all-time high in sales, $255 million compared with $155 million in 1961, a recession year. In any event, however, that dealer that had allegedly sold 500 engines in that earlier era purchased from defendant, in the 15-month period following his replacement of Amplex, a total of 27 engines. (DX 48, at PA 149; PX 78, at PA 140; DX 49, at PA 150) This compares, as noted, with 194 engines purchased by plaintiff Amplex in 1961. In addition, defendant was so eager to take on this dealer (Nat Gates) to replace plaintiff that it waived the usual requirement of a financial statement from a dealer prior to signing him up. (PA 148) In fact, as the proffered testimony of another supplier demonstrated, that dealer (Gates) was then "on a COD basis only (with that supplier) with a very poor credit rating." (PA 104) In fact, Gates' operation had totally deteriorated if in fact he ever enjoyed such prosperity. As was inevitable from the beginning, a decision cancelling a dealer (Amplex) with credit lines in excess of $200,000 (PA 37-38) and a net worth of $100,000 for a dealer that had no credit or adequate floor plan, was doomed to failure. (See PX 78, PA 140.) In fact, Gates did such a poor job for the defendant that he was cancelled on 4/13/64. It is significant that, following Gates' termination, the defendant gave a second franchise to Smith Marine (who was content to sell Johnson engines only) on Ritchie Highway, about one mile from the defunct Amplex establishment. (PX 55, PA 122)

thorough inspection in every respect, including therein (its) display, merchandising, location, management, finances, internal controls and so forth; that upon the conclusion of the nationwide survey, he *ranked Amplex among the outstanding dealerships in the United States* and so informed the officials of Johnson Motors at the Chicago trade show in the fall of 1960." (PA 115, emphasis added)

Proposition 5—that Plaintiff's cancellation as defendant's dealer was part of a deliberate exclusive dealing "policy" of defendant's and that this policy has had adverse competitive effects—is not, as defendant contends, unsupported in the record. For the nation as a whole, it was proffered that "there were between 12,000 and 15,000 outboard engine marine dealers in 1961. It is in evidence that the defendant had 8,700 dealers in 1961." (PA 99) It was further proffered that a Mr. Belden Burns, a salesman for two leading boat companies in the Middle Atlantic States since the mid-1950's, would testify if called that: "With few exceptions, Johnson and Evinrude dealers never carried another line of engines, although occasionally such a dealer would sell a specialty engine such as Bundy." (PA 109, emphasis added) The "exceptions", as we have pointed out in our Petition, are largely dealers located in rural areas or other communities where it is difficult to find a replacement for a recalcitrant dealers: For instance see PA 97-98, Schiavina referring to Sassafras Boat Sales in PX 81. "There isn't too much choice from in this area so I guess we just have to live with this situation until something comes along." See also PX 80, PA 141, Schiavina referring to Chester River Boat Sales, "I would like to find a good prospect for this area. I would make a change." Both of these dealers sold competing engines. A Mr. Paul Wright, a former Outboard salesman, testified that defendant had an "unofficial policy of exclusive dealing," one that was "common knowledge" among the employees of the defendant[5] and that he personally followed that policy in his relations with his dealer-customers:

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[5](PA 64-65) This testimony was erroneously stricken by the District Court.

Q. Now, speaking of yourself and your own actions, Mr. Wright, in what ways, if at all, did you deviate from the official written policy of Johnson Motors?

A. Well, primarily in the field of contacting dealer prospects who were handling another line of engines and whom I was interested in establishing as a Johnson dealer in the area. I would talk to them, tell them what we were interested in, like to have the business, pointed out to them that we would consider their becoming a dealer *with strong implications that we would expect them to carry the Johnson line and the Johnson line alone and phase out or drop, or phase out what they were presently handling.*

Do I make myself clear?[6]

This Outboard salesman gave several instances in which he had done this:

1. *Welsh's Boat Yard, Wrightsville, Pennsylvania:* "Well, I had tried to get Welsh to go along and really phase out and get rid of his Scott engines . . . and when he refused to do this, it was convenient to appoint a dealer in the York area . . ." (PA 66) The dealer appointed to punish Welsh for refusing to phase out Scott was Ilgenfritz Marine, who was quite willing to drop the West Bend and Oliver engine to obtain a Johnson franchise. (PA 66)

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[6](PA 65, emphasis added) Defendant denies that it requires new dealers to "phase out" whatever competing engine they might have been handling previously, citing as an example Nat Gates, the dealer that replaced Amplex after its cancellation. But the very sales report in which the substitution was contemporaneously reported to the home office eloquently illustrates this "phase out" policy: "I am recommending this prospect (Gates) for a Johnson franchise to market Johnson Motors for Edgewater & Arnold (Maryland) and vicinity. This is my replacement for Amplex Marine. *He is now handling Mercury Motors, but may decide to terminate business relations within a year from this date. I am going along with this because of the situation that now prevails in Arnold (Amplex).*" (PA 148, emphasis added)

2. *Pancoast Boat Sales, Woodbury, New Jersey:* "This man was a marine dealer handling the Champion outboard motor and was a parts distributor for Champion, whom I contacted and was much interested in Johnson and who in the course of negotiations and franchising *decided to give up his Champion Line of engines and go to Johnson strictly*." (PA 66, emphasis added)

3. *Guyon's Marina, Stone Harbor, New Jersey:* ". . . I was able to persuade him to give up the Scott franchise and phase out his Scott engines and go Johnson exclusively." (PA 66-67)

4. *Amplex Marine, Arnold, Maryland:*

A. Well, even Amplex Marine, when I talked to them about going Johnson, strongly suggested that they give up their Scott franchise.

THE COURT: They suggested or you suggested?

THE WITNESS: I did, Your Honor. To phase out their remaining inventory of Scott engines that they had on hand.

These are typical examples.[7]

5. *Schulte Boat Works, Philadelphia, Pennsylvania:* This Mercury dealer "wanted to go Johnson and between the first and second call I made on this organization, they decided to remain with Mercury because they had just renewed their franchise and couldn't afford to give it up . . . I was trying to get him to go Johnson and give up his Mercury franchise." (PA 67) Asked about a sales report in which he had commented that Schulte was "a bit of stubborn German and it takes time to wear him down", the defendant's former salesman testified that he was making it clear to the home office that "it will take further work and contact and persuasiveness to get him to join Johnson as a dealer and give up his present line of engines. This is the inference and my intent." (PA 69)

[7](PA 67, emphasis added) It should be noted, contrary to the assertions in the defendant's brief, Mr. Wright arranged for the Scott phase out prior to recommending Amplex for a franchise.

6. *Porgaze Brothers, Philadelphia, Pennsylvania:* This was "one of the largest Scott-Atwater dealers in Philadelphia and we had been for some time trying to secure additional representation in the Philadelphia area, and I called on them and tried to get them to handle the Johnson line and handle it exclusively." (PA 73)

Other illustrations of the "unofficial policy" of exclusive dealing by Outboard Marine are presented in the plaintiff's proffer of proof (set out, for the Court's convenience, in an appendix hereto). For example, it was proffered that a Mr. Lester Jackson of Falls, Oklahoma, a former Evinrude dealer whose franchise had been cancelled after 22 years (for his refusal to order certain unwanted items, as demanded by defendant's salesman), would testify if called that he was told by defendant's salesman "that Evinrude's (defendant's) *policy* forbade the handling of a second line and that if Mr. Jackson would take on such a line, he would cancel his Evinrude franchise." (PA 112)

Plaintiff points to such evidentiary details as these not because it thinks they are particularly significant in the present posture of his case but simply to illustrate that there is in fact record support for the factual matters recited in its petition, that a prima facie case has in fact been made out. As noted, we believe the three critical facts here are (a) the defendant's 60% market share, (b) the fact that plaintiff Amplex was cut off *because* of its refusal to give up a competing manufacturer's engines, and (c) the fact that this termination of plaintiff's dealership was part of a general exclusive dealing policy on defendant's part, one that has had adverse competitive effects. The first two of these facts was accepted by both of the lower courts and is presumably not in serious dispute here. The third—the fact of competitive injury—has been commented on by the Solicitor General in these words: "The court below did not reach the question of the anticompetitive effect of respondent's exclusive dealing arrangements and that question is not before this Court. Ten years ago, the Federal Trade Commis-

sion held that the respondent's exclusive dealing arrangements had a significantly adverse effect upon competition because they foreclosed competing manufacturers from a significant share of the market . . . *Petitioner's (Amplex's) proof and offer of proof in the present case would justify similar conclusions to those made by the Federal Trade Commission.*"[8]

CONCLUSION

For the reasons stated, we respectfully submit that the petition for a writ of certiorari should be granted.

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December 1967

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[8]Memorandum for the United States as *Amicus Curiae* in Support of the Petition for a Writ of Certiorari, pages 7 and 8, footnote 13 (emphasis added). Thus, whereas the Solicitor is saying that the issue of competitive injury is "not before this Court" because a prima facie case of such injury has been made out in the record and is not subject to challenge in a summary proceeding such as this one, defendant apparently reads this footnote as a statement by the Solicitor that proof of competitive injury, is not required in cases of this character (Respondent's Brief in Opposition to Petition for Certiorari, page 33, footnote 41), an interpretation of the Solicitor's language that we believe to be clearly incorrect.

APPENDIX C

(Proffer)

[769] MR. FREISHTAT: Beginning first with a statistical proffer of evidence from the Boating Industry magazine produced by the boating industry, 1965, if admitted into evidence, this magazine would show that in 1961, 343,000 outboard engine units were sold; that further in 1961, the retail dollar volume of these 343,000 units is $155,000,000.

If admitted into evidence, the annual Market [770] Research Notebook written by the Boating Industry Association would confirm these identical figures.

The plaintiff will proffer that the price list of Outboard Marine Corporation indicates a markup of thirty-two percent on its outboard marine engines. Further, thereupon reducing the retail dollar volume of the $155,000,000 by the thirty-two percent, and outboard engines are fair traded, the retail -- the wholesale dollar volume becomes $108,500,000.

THE COURT: May I have that figure again, please?

MR. FREISHTAT: $108,500,000.

Based upon Outboard Marine Corporation's unit vol-

the dealers who was only handling Johnson alone subsequently, is that correct? A. Yes.

Q. Now, where is Holt's Marine located? A. Seaford, Delaware.

Q. Would you classify that as a rural as compared to an urban area such as Baltimore? A. Rural area.

Q. Where is Etynors Marine Service located? A. Etynors?

Q. Etynors, I'm sorry. A. High Spire, Pennsylvania.

Q. Would you consider that as a rural area rather than an urban area such as Baltimore? A. It's not as big as Baltimore. It's a small coal -- steel mill area. I would say -- it's right next to Harrisburg. I would say it's urban.

Q. Do you know the population of that particular city where it's located? A. I sure don't.

Q. Now, where was Sassafras Boat Sales located? A. Georgetown, Maryland.

THE COURT: I am sorry, sir, but I did not get that name.

[742] THE WITNESS: I'm sorry, sir. Georgetown.

THE COURT: Georgetown.

THE WITNESS: Maryland.

BY MR. FREISHTAT:

Q. Would you classify their location as a -- would you consider this dealer as one of those dealers that you had to live with because there was no one else better to take his place? A. No.

THE COURT: Now, Georgetown, Maryland is where? On the Eastern Shore of Maryland?

THE WITNESS: Yes, sir.

Q. Perhaps I can refresh your recollection, Mr. Schiavina. Can you identify this?

MR. FOLEY: May I see it, please?

MR. FREISHTAT: I'm sorry.

(Document handed to Mr. Foley by Mr. Freishtat.)

A. This is Sassafras Boat Sales.

Q. And what's the date of the report, sir? A. I can't see it. It looks like --

ume of 198,186 in evidence for 1961 and Outboard Marine Corporation's wholesale dollar volume of $64,984,155 in evidence, exclusive of parts, Outboard Marine Corporation in 1961 controlled 57.78 percent of the unit volume of the industry and 59.89 percent of the total dollar volume of the industry.

In addition, it is proffered that Outboard Marine Corporation sold $39,300,133 worth of parts in 1961, which would substantially increase its percentage of dollar volume of the total engine and parts industry.

It is proffered that there were between 12,000 and 15,000 outboard engine marine dealers in 1961. It is in evidence that the defendant had 8,700 dealers in 1961.

It is proffered that Amplex sold $25,000 more [771] engines, more Johnson engines in 1961 than any other dealer in Territory No. 23.

It is proffered that Outboard Marine Corporation has canceled or did not renew in excess of 4,000 dealers between 1960 and 1965.

It is proffered that if Officer John Marozza were to testify before this Court, he would testify that he is a police officer of Baltimore City and an outboard boat owner since 1960 and that he purchased his Lone Star boat and Johnson engine from Amplex; that he had been a regular customer of Amplex in 1960 and '61 and he personally observed the excellent displays, inside and out, that characterized the Amplex operation during those years; further that he was present in the Amplex showroom on July 20th, 1961 and that he witnessed a heated argument between a Johnson sales representative and Mr. Canzona; that the entire subject of the conversation had to do with Amplex's Mercury franchise across the street; that during the aforementioned argument, he heard this representative threaten that Amplex must give up its Mercury franchise or lose its Johnson franchise. He subsequently became embarrassed at the heat of the conversation and left.

THE COURT: Now, let me go back for just a moment.

On these various statistics about unit sales and [772] dollar volume which you have proffered, these two publications are the ones which I think have already been marked for identification, are they not?

MR. FREISHTAT: No, sir, we neglected to mark them for identification; they have not been --

THE COURT: All right. They may certainly be so marked, if you wish, but these are the same publications that were tendered before, are they not?

MR. FREISHTAT: Yes, sir, they are.

THE COURT: All right. Now, this time, are you going to have anybody appear to testify as to the degree to which the statistics are based on estimates, how the estimates were made and the probable accuracy of the estimates?

MR. FREISHTAT: I have contacted various representatives of the two major magazines. Let me phrase it this way, sir. I am hopeful of obtaining one of the gentlemen in from Chicago, which is the nearest place, to testify but, however, I have done considerable additional research in this area and though I'm not prepared to do so at the moment, I do feel that the cases will support the admission of these two booklets without the necessity of bringing in this gentleman from Chicago. As I say, however, I will be prepared at a subsequent date to provide Your Honor with the authorites which I feel support this petition.

Incidentally, if I might digress for a moment, [773] on the face of one of these magazines, it specifically states that these figures are the best obtainable in the industry and --

THE COURT: I understand the magazine says they are the best obtainable but the magazine also says that they are partially estimates.

MR. FREISHTAT: Yes, sir, it certainly does.

THE COURT: It seems to me I have got to have some evidence of the probable accuracy or the probable inaccuracy or something of that sort.

MR. FREISHTAT: However, I would suggest this to the Court. Through the defendant's own prospectus, they are acknowledging --

THE COURT: The defendant simply says it thinks it has over fifty percent of the market. I have read the prospectuses.

MR. FREISHTAT: Well, in light of that admission and in light of the estimates that are contained in these documents, the specific percentage between excess of fifty and fifty-nine percent, I personally do not feel is --

THE COURT: But is it your position that fifty-nine percent per se proves monopoly?

MR. FREISHTAT: No, sir. Fifty-nine percent is one factor amongst others which --

THE COURT: Certainly it is but I did not know [774] whether you thought that you had -- for example, in line with the statement of Judge Hand, I think it is, in the Aluminum Company case, whether you were claiming that you had proved sufficient market dominance that you in effect create a presumption of monopoly and cast the burden of proof on the defendant.

MR. FREISHTAT: No, sir. It is one major factor that must be considered amongst others.

THE COURT: All right.

MR. FREISHTAT: When we get to arguing the law, I'll pursue it at that time.

THE COURT: I will be glad to hear you. Now, please get on with your proffer.

MR. FREISHTAT: Yes, sir.

Mr. Robert L. Swanson will testify that he had been for several years a Claims Manager for Nationwide Insurance Company and during 1960 and '61, he assisted Amplex as a part-time salesman; that during the winter of '60 and '61, Amplex enjoyed an amazing boom in lay-away sales on motors and he was responsible for many of these sales; that the great increase in sales was in large measure, in his opinion, due to Amplex's Johnson franchise; that the public reception and desire for Scott

outboard motors as he found it in selling for Amplex during the aforementioned period was extremely limited.

[775] Throughout the first several months of '61 when he worked as a salesman, the Amplex showroom was always decked out attractively with displays of new Johnson motors, boats and rigs.

Mr. Harry James will testify before this Court that he succeeded a Mr. Robert Ewart, E-w-a-r-t, as the Lone Star Sales Representative for the Middle Atlantic States in the summer of 1960 and remained in that capacity until April of 1962; that one of his biggest and best accounts was Amplex, that in his opinion, Amplex's great increase in sales in '60 and '61 was due to its having the right product lines, principally Lone Star, Johnson motors and Revel Craft and to its modern merchandizing and service techniques; that he witnessed in September of 1961 the conversation between Mr. Canzona and Mr. Preston and Mr. Foster of Johnson Motors at the Chicago trade show and that Mr. Canzona informed both Mr. Preston and Mr. Foster of the threat by Schiavina to terminate Amplex because of the new Mercury franchise.

He will testify that during the aforementioned conversation, Mr. Preston and Mr. Foster remained completely noncommittal and evasive and merely reiterated that Amplex would probably lose its franchise; that he, Mr. Harry James, lost considerable confidence in Amplex after the termination by Johnson for he knew from his long experience in the marine trade that the loss of a prime franchise such as Johnson or [776] Evinrude assuredly would curtail sales, not only of motors but of his Lone Star boats as well.

Further, that Lone Star had only minor and inconsequential disputes with Amplex until after the Johnson termination where there was a serious decline in sales and more serious financial difficulties occured.

Further, that the Boating Industry magazine is the accepted trade publication for the marine industry and there is no more authoritative publication. Further,

that in seeking out new dealers, he invariably approaches Johnson and Evinrude outlets first, realizing from his experience and observation that these dealers sold the biggest dollar volume of boats, as well as motors.

Mr. Robert Ewart will testify that he was --

THE COURT: That is H-e-u --

MR. FREISHTAT: No, sir. It's E-w-a-r-t.

THE COURT: E-w-a-r-t. Thank you.

MR. FREISHTAT: That he was the Lone Star Boat Company's representative servicing the Amplex account until the summer of 1960 and that thereafter, he represented the Owens Yacht Company in the Middle Atlantic States; that prior to late 1961, he knew Amplex to be among the top outboard boat and motor dealers in the country in every aspect; that his best dealers for Lone Star and Owens were by far the area's Johnson and Evinrude dealers; that subsequent to the [777] loss of the Johnson franchise by Amplex, he observed on frequent visits a noticeable decline in business activity and public acceptance; that during his association with Lone Star, Amplex never had more than minor financial problems with the Boat Company and that in many instances, the disputes involved shortcomings on Lone Star's part; that subsequent to the loss of Amplex's Johnson franchise, he experienced grave concern for the company, realizing from his background and his experience that such a setback and loss would, of necessity, result in a sales decline of Lone Star boats and severely curtail public acceptance.

Further, that he cannot recall a single time on his frequent visits to Amplex that attractive displays were not prominent in the showroom, inside and out, or that the Johnson motors were not prominently and attractively displayed.

Further, that the Boating Industry is the accepted trade journal throughout the industry and there is no more authoritative publication available.

Mr. J. Wistar, W-i-s-t-a-r, Rowe, R-o-w-e, will

testify that he has been a Sales Representative of the William H. Whiting Company for in excess of fifteen years; that the William H. Whiting Company is one of the most prominent marine supply distributorships in the east and that during these many years,he had intimate dealings with outboard [778] boat and motor dealers throughout Maryland and adjoining areas; that Amplex was one of the biggest and best accounts of the Whiting Company in 1961 and that its payments of account were satisfactory in relation to its growth and volume; that the volume of marine supplies and accessories purcased by Amplex rapidly increased from $400 in 1956 to $21,000 in 1961 and back down again to $500 and $600 in 1965.

Further, that he on the basis of his long experience in the marine industry and knowing the public demand for Johnson motors and Evinrude motors attributed this decline to the loss of the Johnson Motors franchise; that his principal accounts among outboard and motor dealers were those who had either Johnson or Evinrude franchises; that these dealers almost invariably were the biggest and the busiest outlets and they bought and sold by far the largest quantity of marine supplies; that on his numerous visits to Amplex throughout 1961, he always found the displays to be of exceptional high quality; and finally, that in 1961, Mr. Nat Gates was a customer of Whiting and Company and they were on a COD basis only with a very poor credit rating.

Mr. Robert Reynolds will testify that he was employed as a responsible Manager of Amplex in 1956 through 1962; that among his duties were sales and service supervision, as well as inventory control; that at no time did Mr. Schiavina during any of his calls on Amplex take inventory [779] of Johnson motors with Mr. Reynolds; that during the calls in July and September, Mr. Schiavina in fact did not take any inventory at all.

That on July 20th, 1961, he observed Mr. Schiavina in the showroom engaged in a heated argument with Mr. Canzona and others over the Mercury franchise across

the street; that he heard Mr. Schiavina state to Mr. Canzona that if Amplex did not get rid of the Mercury franchise, Johnson would get rid of Amplex; that the showroom of Amplex during the first nine months of 1961 always contained a display of numerous boats, boat rigs and new Johnson motors.

Mrs. Margie Smouse, S-m-o-u-s-e, will testify that she, as secretary to Mr. Canzona, observed his extremely troubled reaction to the phone call of Mr. Schiavina in early July of 1961; that she knew that it was Mr. Schiavina on the phone since she had answered the phone and called Mr. Canzona to the phone; that she, as secretary to Mr. Canzona, visited the showroom on July 20th, 1961 and overheard a violent argument between Mr. Schiavina and Mr. Canzona and several others and that a portion of the argument which she heard pertained to Amplex's having a Mercury franchise across the street. She heard nothing more.

Mr. James Harris will testify that his background and experience in the marine industry dates back to 1953 in the servicing and sales of outboard motors; that he once [780] served a Mercury distributor in a service capacity; that he served Scott as Field Representative and Sales Representative; that he later served Bundy in the capacity of Field, Sales and Service Representative; that he used the Amplex facilities as a regional service station for Scott outboard motors and knew the Amplex shop to be among the best outboard service facilities in the locale.

That Amplex from the standpoint of displays, service, identification, size and reliability ranked among the top marine dealers in the eastern states.

Further, that the market for Scott outboard motors suffered a severe decline in 1960 and '61 leading to an extensive cutback in the Scott field force and to the eventual closing of the Minneapolis plant in the latter part of 1962; that thereafter, the Scott dealer organization for almost all practical purposes ceased to exist in the Mid-

dle Atlantic States; such dealers as there remained were inconsequential.

THE COURT: What were the years that you say this decline started?

MR. FREISHTAT: The market for Scott suffered a decline in '60 and '61.

THE COURT: Thank you.

MR. FREISHTAT: That subsequent to the loss of the Johnson franchise by Amplex, he experienced a marked loss of [781] confidence in Amplex, stemming from his experience and knowledge over many years as to the damaging effects the termination of a prime franchise such as Johnson would have on a dealer; that he foresaw and later observed the decline in sales and service activity, which he knew would result from the loss of Johnson; that the Boating Industry magazine is the accepted trade journal throughout the boating industry and is relied upon by all manufacturers and dealers in the normal operation of their business.

Mr. George E. Etzel, E-t-z-e-l, will testify that he has been for many years a successful insurance broker in the Baltimore metropolitan area and that he has extensive training and experience in inspecting and rating commercial risks of all types; that he visited Amplex on March 2nd and again on March 10th, 1961, for the purpose of purchasing a Revel Craft boat and Johnson seventy-five horsepower outboard motor; that on the occasions of both visits, he found attractive displays of new boats, new Johnson motors and complete rigs in the Amplex showroom and that the outside display area was attractively laid out; that on these and subsequent visits, he observed no noticeable difference in the cleanliness and attractiveness of Amplex.

That on the occasion of his two visits in March 1961, he made a special point to visit Amplex's service shop and that upon his inspection, he found it to be well [782] organized, neat and clean; that he in fact observed only one minor fire violation, in testimony to the clarity of his recollections; that on the one occasion after his

purchase that he needed service on his motor, Amplex accorded him that service promptly and expertly the very same day.

Further, that he would never again purchase an outboard motor from Amplex because he would not buy any engine other than a Johnson and that he in fact recently visited Smith Marine near Amplex, right up the street, in the course of shopping for a new hundred horsepower outboard motor to replace his seventy-five horsepower engine.

Now, Your Honor, I have a series of individuals, approximately ten in number, who would all testify as to the same basic set of facts as to displays and the service facilities, some of which are very distinguished and reputable people in the community.

Agnes Turner; Father Cloman, C-l-o-m-a-n, Riggie, R-i-g-g-i-e; General Clifton B. Cates, C-a-t-e-s; Brigadier General S. S. Ballantine; Mr. Oliver Hanson; Mr. Nicholas Wagner; Mr. Don Marshall; Mr. Frank Janzzak, J-a-n-z-z-a-k; W. Kirkwood Kelly; Captain Joseph Bowersox.

A Mr. Gordon Meyer will testify as to the desirable attributes of the Amplex dealership that led them to make their purchases of boats and motors in 1960 and '61. They will testify as to the attractive displays at Amplex, [783] the quality and efficiency of the service, the cleanliness of the premises and the courtesy and helpfulness of the management and employees; that after Amplex lost the Johnson franchise, they experienced a drop in confidence in the dealership for fear that Amplex would not be around or able to service their Johnson motors.

Inspector Barnes Braun, B-r-a-u-n, will testify that from 1960 to the present, he has been an enforcement officer for the Chesapeake Bay Affairs Division of the State of Maryland, a member of the Tidewater Fisheries Police and that his job during the boat season principally is to patrol the Bay and tributaries and the outboard

speedboats; that in '60 and '61, he relied on Amplex's service department to keep his Johnson outboard motors in good repair and that Amplex also serviced other Johnson motors in the police fleet; that Amplex did an excellent job of servicing these Johnson motors, frequently even under the pressure of emergency conditions; that the premises of Amplex, including both the display areas and service facilities, were invariably neat, attractive and efficient in '60 and '61; that he and other members of the Tidewater Police preferred Amplex's service to that of other Outboard Marine Corporation dealers in the area in '60 and '61.

That the Tidewater Police purchased most of their engine parts from Amplex and found Amplex to maintain a [784] generous supply of the Johnson motor parts for the Johnson motors.

Mr. William Russell will testify that he witnessed and participated in the July 20th argument between Mr. Canzona and Mr. Schiavina, in which the latter threatened to terminate Amplex's Johnson franchise unless Amplex got rid of Mercury; that he was directly involved in all of Amplex's efforts subsequent to the loss of the Johnson franchise and its effort to sustain the business or even to diversify it in an effort to save it following the loss of the franchise and that despite the intensified program to maintain the outboard marine business volume after the loss of Johnson, sales nevertheless rapidly declined to a point by mid-summer of 1961 when Mr. Russell left for overseas at which the business sank into serious market and financial difficulties.

THE COURT: Wait a minute. What was this latter? The business declined until the summer of 1961?

MR. FREISHTAT: Business declined subsequent to the summer of 1961.

THE COURT: I see. All right.

MR. FREISHTAT: Mr. Belden Burns will testify that he had been employed by the Owens Yacht Company and the Revel Craft Manufacturing Company from the mid-1950's through 1961 and that most of his duties during

these years involved the sales and service of Owens and Revel Craft [785] dealer accounts in the Middle Atlantic States. Amplex was his biggest and best account for Revel Craft in 1960 and '61; that in the spring of 1961, as at all other times, he visited Amplex on the average of two or three times a week, owing to its proximity to the Revel Craft plant, that on all visits he found Amplex's premises and showroom to contain attractive displays of new boats, new Johnson motors and complete rigs.

That Amplex in February of 1961 displayed new boats and motors over approximately thirty percent of the main floor space in the Chesapeake Bay boat show at the Fifth Regiment Armory.

In his dealings, he always found Amplex was a financially sound and responsible dealer; that when he heard of the loss of Amplex's Johnson franchise, he experienced a serious drop in confidence in the dealer, knowing from his long experience in the industry that the absence of a prime franchise such as a Johnson line would reflect in decreased sales and market curtailment of public acceptance and that secondary lines such as Mercury or Scott would not suffice to replace a prime line.

That his major accounts invariably were Johnson or Evinrude dealers and that these, including Amplex, accounted for most of his volume in both Owens and Revel Craft; that there were approximately 110 dealers that he would call on at Revel Craft. With few exceptions, Johnson and Evinrude [786] dealers never carried another line of engines, though occasionally such a dealer would sell a specialty engine such as Bundy. Of the approximate 110 dealers that he was familiar with, the majority and the better outlets were always Johnson or Evinrude dealers.

A Mr. Walter Johnson, Jr. of Philadelphia will testify that they were trading as Johnson and Towers and had been a distributor of Johnson motors for approximately thirty-five years and that they were among the largest dealers in the United States; that in the latter part of

1959, a Mr. William Jonas, J-o-n-a-s, Sales Manager of Johnson, demanded that they cease handling a Neptune outboard motor that they had taken on. The Neptune was a low priced, small horsepower specialty product that competed with the lower horsepower Johnson engines. In compliance with Mr. Jonas' demand, they took the Neptune off display but continued to handle it; however, they kept a separate inventory for the Neptune engine so that the District Representative in his examination of their premises would not know that they were still selling the Neptune engine.

Walter Johnson, Sr. will testify that all the years that he has been in the marine industry, in excess of forty years, he has always relied upon the Boating Industry magazine in the operation of his business.

Based upon his thirty-five years, thirty-five to [787] forty years of experience in the marine industry, in his opinion, neither the Mercury, Gale or Scott engine had nearly the appeal or public acceptance of a Johnson engine or Evinrude.

Mr. Larry Berry of Philadelphia will testify that he was told by Mr. Schiavina at the end of 1961 that he either take on the Johnson Motors' new boat line or that he, Schiavina, would summarily cancel his franchise. Mr. Berry will testify that he did not want the boat line and he refused to take it on and he was in fact summarily canceled by Schiavina.

THE COURT: Wait a minute. His testimony is that he was told to take on what line?

MR. FREISHTAT: Johnson Motors in 1961 came out with a boat line that prior to that time they did not have. Evinrude did the same at the time and they were attempting to establish boat dealers.

THE COURT: When did this take place?

MR. FREISHTAT: The latter part of 1961.

A Mr. H. E. McFadden, M-c-F-a-d-d-e-n, will testify as to the details of the termination of this Johnson franchise in 1961 after some twenty years of business; that the Johnson District Representative specifically and

in no uncertain terms laid down a policy that he had to purchase certain types and amounts of Johnson motors which he, [788] McFadden, had not customarily stocked and which he had no use for and could not sell; that he was told by the District Representative that either he take on these additional lines or that he, the District Representative, would in fact cancel him.

THE COURT: Now, this is to take on an additional line of parts?

MR. FREISHTAT: Additional engines that Mr. McFadden had no use for. He will further testify that his distributorship is in a locale where only low horsepower engines are used, that is, on a lake, as compared to a more open area and that he could not sell any higher horsepower engines.

That upon his refusal to take on the higher horsepower engines, a heated argument ensued and Mr. McFadden told his District Representative that he would not take it on and in no uncertain terms to get out of his place and he ceased his relationships with Outboard Marine.

THE COURT: Who would Mr. McFadden identify as the District Representative? Is this Mr. Schiavina again?

MR. FREISHTAT: No, sir, this is not Mr. Schiavina. This is another District Representative, the name of which will be supplied by Mr. McFadden. At the moment, I do not know it, sir.

THE COURT: Where is Mr. McFadden's place of [789] business?

MR. FREISHTAT: This is in Hagerstown, sir.

THE COURT: Now, wait just a minute. Now, when did you say that this took place in point of time that his testimony would relate to?

MR. FREISHTAT: 1961, sir.

THE COURT: 1961. Thank you.

MR. FREISHTAT: Mr. Skip Hanson of Geneva, Illinois will testify as to the details of his summary cancellation as a dealer of Johnson motors on thirty days'

notice after twenty nine years of enfranchisement; that he was told by the District Representative that Johnson Motors gave blanket authority to its District Sales Managers as to cancellations and renewals; that he, the District Representative, could in fact cancel Mr. Hanson's franchise.

Mr. Tommy or Thomas Bronson, B-r-o-n-s-o-n, of Memphis, Tennessee will testify as to the abrupt termination of his Johnson Motor franchise after thirty years of operation; that the District Sales Representative of Johnson informed him that he, the District Representative, could act with unilateral authority and did so by demanding that Mr. Bronson build a new showroom and when Mr. Bronson could not comply by summarily terminating his dealership.

He, in addition, was told by the District Representative that whatever he, the District Representative, [790] recommended to the factory was always and invariably followed.

Mr. Lester Jackson of Falls, Oklahoma, will testify that his Evinrude franchise was abruptly cancelled after twenty-two years of dealership; that the District Sales Representative of Evinrude threatened cancellation and did in fact cancel when Mr. Jackson balked at ordering certain unnecessary items of inventory; that he was told by the District Representative that the factory always supported the District -- was told by the District Representative that the factory always supported the District Sales Representative in a decision to cancel.

I, in turn, contacted the factory and I was informed by the factory that the recommendations of the District Representative would always be followed; that previously in about 1958 or '59, being uncertain of the time, Mr. Jackson expressed interest in a second line of engines. He was told by the Evinrude District Sales Representative a Mr. Jack Sullwood, S-u-l-l-w-o-o-d, that Evinrude's policy forbade the handling of a second line and that if Mr. Jackson would take such a line, he would cancel his Evinrude franchise.

THE COURT: When does he say that his dealer's franchise was canceled?

MR. FREISHTAT: It ultimately was canceled in the latter part of '59.

[791] Mr. Peter Schauer, S-c-h-a-u-e-r, will testify that he was the District Sales Representative for the Dorsett Boat Company from 1961 through 1963 and that Amplex was one of his largest accounts; that Amplex was amongst his biggest and best dealers, owing to its merchandising, displays, service, promotion facilities and attitude; that he sought out dealers, largely Johnson and Evinrude dealers, since these represented the best retail outlets in the industry and that Johnson and Evinrude engines had the greatest public acceptance; that the Boating Industry magazine is the accepted trade journal for the marine industry and is relied upon by all in the industry.

That he lost confidence in Amplex when the Johnson franchise was terminated because from his experience, he realized that such a loss would either cripple or kill a dealer of Amplex's size and volume; that he personally observed at Amplex a rapid decrease in sales and of Dorsett boats after the termination by Johnson and that he knew this from his experience and personal observations to result directly from the dealer's inability to maintain sales volume with secondary brands of outboard motors such as Mercury or Scott.

That until the loss of the Johnson franchise, Dorsett had only a few, if any, minor collection problems with Amplex but that subsequent to the loss of the Johnson [792] franchise, the dealer gradually developed serious financial problems; that in his experience with Johnson and Evinrude dealers throughout his territories, very few, if any, Johnson or Evinrude dealers carried a secondary line, an additional line.

Mr. Robert J. Robichaud, R-o-b-i-c-h-a-u-d, --

THE COURT: Spell it again for me, please.

MR. FREISHTAT: R-o-b-i-c-h-a-u-d, Robert Robichaud of New York City would testify as to his educa-

tional background that he obtained a BS in business administration from the New York University, that his major was economics, specifically statistics, that his minor was mathematics and marketing; that he has in excess of thirty credits toward his Master of Economics degree; that in 1965 and up till the present time, he's employed by the Chemical Construction Corporation as an Operations Research Consultant.

THE COURT: 1965?

MR. FREISHTAT: Yes, sir. It's in reverse. They are giving his most current occupations.

THE COURT: Very well.

MR. FREISHTAT: Operations Research Consultant, which pertains to profit orientation, statistical analysis projections; that in November 1964 through November of '65, he was employed by the Tidewater Oil Company as a Supervisor of Operations Research and Planning; that his major function [793] was to plan and supervise all Eastern Division management science projects and this included analyses and forecasting systems as to profits and also a thorough review and analysis of the supply and distribution functions.

In June of '63 through November '64, he was employed by the Socony, S-o-c-o-n-y, Oil Company.

THE COURT: I think it is generally pronounced Socony but it makes no difference.

MR. FREISHTAT: Socony Oil Company as a Project Analyst for corporate supply and distribution. The position consisted of developing an integrated linear programming model of supply and distribution and profit projection and analyses.

September 1959 through October 1961, he was a New York University Graduate School of Retailing Instructor and Research Assistant; that he is the author of the following publications: Do Christmas Catalogs Stimulate Purchasing in 1960 Journal of Retailing; Comparative Analysis of Sales and Profits, published in 1959, the Journal of Retailing; The Big Drop, a Study of Declining Retail Profits in 1960, Journal of Retailing; A Report to

the Marine Retailer, fall of 1961 sponsored by Outboard Boating Club of America, seventy-five pages, and Retail Store Profits in 1965, which is to be published this fall.

Mr. Robichaud will testify that in 1960, he was [794] a member of the New York University School of Retail Research team that at the invitation of Outboard Boating Club conducted a detailed survey of the retail marine market throughout the United States; that as one of the key men in this survey, he personally interviewed at considerable length numerous boat and motor dealers throughout the nation, including many in the Baltimore area.

That he has been engaged in the fields of retail operations and operations research for several years and is considered an expert in these fields; that in the summer of 1960, he personally interviewed the principals of Amplex and subjected the Amplex dealership to a most thorough inspection in every respect, including therein display, merchandising, location, management, finances, internal controls and so forth; that upon the conclusion of the nationwide survey, he ranked Amplex among the outstanding dealerships in the United States and so informed officials of Johnson Motors at the Chicago trade show in the fall of 1960.

That the vast majority of the largest and best dealers he and his teams inspected were Johnson and Evinrude dealers; that the Outboard Marine products clearly were the most abundant and most desirable in the market; that in his opinion, based upon his knowledge in retail marketing and his personal knowledge of Amplex and of the marine industry, that Amplex, like any other merchant with a key product line, [795] suffered an irreparable loss upon the termination of its Johnson franchise and that any small business, upon suffering such a setback, would find it virtually impossible to recover; that he has conducted an exhaustive study by established operations research methods into the plight of Amplex subsequent to the loss of Johnson to determine the probable damages to the company.

He will testify for the Court not only as to projections and findings as to damages but also reasonable and recognized substantiation of his conclusions that the damages resulted from the loss of the Johnson franchise.

Mr. Canzona will further testify --

MR. OWEN: Is that name correct?

MR. FREISHTAT: Yes.

MR. OWEN: Mr. Canzona will resume?

MR. FREISHTAT: Yes. That prior to the actual termination of Amplex's Johnson franchise, he personally informed Mr. Foster at Amplex on September 14th in the presence of Mr. Schiavina of Mr. Schiavina's motive for canceling and Mr. Foster again at the Chicago trade show in the presence of Harry James of Lone Star.

That Amplex sold approximately fifteen or twenty Mercury motors in 1962, as compared with almost 150 Johnsons in 1961 and that the largest number of Mercury engines ever sold from Amplex in any subsequent year was about forty; that [796] Amplex sold approximately fifteen Gale motors in 1962, having purchased about twenty, and that Oubotard Marine stopped production of Gale outboard motors in 1963, distributing its left-over stock to Johnson and Evinrude dealers at reduced prices.

That the McCulloch Corporation closed its Minneapolis plant in '63, for all practical purposes removing itself as an effective competitive force in the eastern market.

Further, at the present time, there are no marine dealers worthy of note handling the Scott engine in the Baltimore metropolitan shopping area.

Further, at the present time, there are five Mercury dealers in the metropolitan Baltimore area, including Northern Anne Arundel County. One is a plumbing and heating establishment by the name of Theiss, T-h-e-i-s-s. Another is a small lumber company by the name of Jordan. Two are primarily small outboard service shops that also sell engines by the name of Doetsch,

D-o-e-t-s-c-h, and Champ's and one is a small marine dealer; that by virtue of facilities, location, advertising, boat show promotion and other obvious manifestations, the major outboard dealers in the metropolitan Baltimore area today are Imperial, a Johnson dealer, and Marine Basin, a Johnson dealer, Smith, a Johnson dealer in two locations, and Jenkins, an Evinrude dealer.

That would conclude the proffer. Excuse me.

[797] A Mr. John Cornwell, C-o-r-n-w-e-l-l, will testify that in the latter part of 1962, he was the Sales Representative for Traveler Boats; that at the Captain's Table, a normal meeting place for marine representatives, he engaged Mr. Schiavina in a conversation in which Amplex was discussed. Mr. Cornwell will testify that he was considering the establishment of Amplex as a Traveler Boat distributor and he was told by Mr. Schiavina that Amplex -- he had canceled -- he, Mr. Schiavina, had canceled Amplex because they took on the Mercury engine.

That he, Mr. Cornwell, prior to going to work for Traveler Boat Company, was employed as the District Representative of the Mosley, I believe it is, Paint Company, a supplier of marine outboard paints, and that in this capacity, he visited Amplex regularly from 1960 through 1963 and that he always observed excellent displays as to boats and engines, as well as — well, strike that.

* * *

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In the

SUPREME COURT OF THE UNITED STATES

October Term, 1967

No. 668

AMPLEX OF MARYLAND, INC.,
Petitioner,

v.

OUTBOARD MARINE CORPORATION,
Respondent.

PETITION FOR REHEARING ON SUPREME COURT'S DENIAL OF WRIT OF CERTIORARI

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TABLE OF CASES

Albert H. Cayne Equipment Corp. v. Union Asbestos and Rubber Co., 220 F. Supp. 784 (S.D.N.Y. 1963) 10

Best Advertising Corp. v. Illinois Bell Tel. Co., 229 F. Supp. 275 (S.D. Ill., 1964) 10

House of Materials, Inc. v. Simplicity Pattern Co., 298 F.2d 867 (2d Cir. 1962) 10

Lessig v. Tidewater, 327 F.2d 451 9

McElhenny & Co. v. Western Auto Supply Co., 167 F.Supp. 949 (1959) 9

Swift & Co. v. United States, 196 U.S. 375 ..... 8, 9

Times-Picayune v. United States, 345 U.S. 594 7

United States v. Parke-Davis & Co., 362 U.S. 29 (1960) 10

OTHER REFERENCES

Federal Treble Damage Antitrust Suits (1965), Timberlake..... 10

Moody's Industrial Manual 29 (June 1967) 2

"A Simple Refusal To Deal," 71 Yale L.J. 1565 (1962) 10

"Customer Selection or Dealer Protection", 22 ABA Anti-Trust Section 49 10

Doric Simplicity or Dirty Pool, 29 U. Det. L.J. 414 (1962).... 10

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Petitioner respectfully requests that the Court grant rehearing of its order dated January 15, 1968, which denied certiorari, and that the Court now either grant certiorari or reserve ruling on the petition for certiorari until the Antitrust Division of the Department of Justice has had an opportunity to initiate and complete an investigation or other proceeding to determine whether the defendant Outboard Marine Corporation has and is in fact engaging in unlawful exclusive dealing and monopolization of the outboard motor industry as alleged here by plaintiff Amplex.

Subsequent to the Court's order of January 15, 1968, plaintiff Amplex has filed with the Antitrust Division of the Department of Justice a request for an investigation

and prosecution of defendant Outboard Marine Corporation for its exclusive dealing practices, together with a copy of the transcript of testimony received and proffered in the instant proceeding, the substance of this complaint to the Division being that the defendant has in fact used the device of exclusive dealing to create and maintain a monopoly and that the public interest requires (a) an injunction against further such unlawful exclusive dealing, and (b) divestiture and dissolution of defendant Outboard Marine Corporation into two or three separate, competing firms. (Defendant's two princ ' divisions, "Johnson" and "Evinrude," were originally separate, competing entities, the competition between them having been eliminated by merger in 1936, while a prior consolidation in 1929 had united Evinrude and two other firms, Elto Outboard Motor Company and Lockwood Motor Company. *Mood's Industrial Manual* 29 (June 1967)).

If such a proceeding is in fact undertaken (as plaintiff has reason to believe it will be, for the reasons indicated below), and if that proceeding should result in a judicial finding that defendant Outboard Marine Corporation has in fact been engaging in unlawful exclusive dealing and monopolization of the outboard motor industry on a national scale as plaintiff alleges, then the instant order of January 15, 1968, denying certiorari in the present case, will have necessarily worked a serious miscarriage of justice: plaintiff Amplex, though then judicially recognized as the victim of an antitrust violation, will at that point have been irrevocably barred from all possible avenues of redress, particularly the statutory right to bring suit on the basis of evidence discovered by the government's superior investigative techniques and resources, the right to avail itself of any judgment obtained by the government as a presumptive aid in proving the fact of violation in its subsequent private action, and the right to benefit from the tolling of the statute of limitations during the pendency of the government action.

Plaintiff believes the Department of Justice, Antitrust Division, will in fact conduct the requested investigation and prosecution for the following reasons:

(1) The Assistant Attorney General in charge of the Antitrust Division, Dr. Donald F. Turner, has as already noted reviewed the evidence introduced and proffered in the instant proceeding and, on the basis of that review, has joined the Solicitor General in representing to the Court here, in the *amicus* brief of the United States, that:

a. *This evidence alone* is sufficient to support a finding that defendant Outboard Marine Corporation is in fact actively engaging in the kind of competition – injurious exclusive dealing – which the Federal Trade Commission had previously found defendant practicing and ordered it to stop in 1956. As the Solicitor and Dr. Turner have expressed it to the Court here: "Petitioner's proof and offer of proof in the present case would justify similar conclusions to those made by the Federal Trade Commission (in 1956)." Memorandum for the United States as Amicus Curiae in Support of the Petition for a Writ of Certiorari p. 8, n. 13 (November 1967).

b. A substantial *public* interest is injured by this defendant's successful policy of exclusive dealing in this industry and the failure of the lower courts here to deal appropriately with it. ". . . we think that the record shows that the respondent's exclusive dealing produced a sufficiently serious foreclosure of outlets to respondent's competitors to establish the requisite anticompetitive effect under either Section 1 of the Sherman Act or Section 3 of the Clayton Act." *Id.*, p. 7.

As operating head of the United States' principal antitrust arm, the Antitrust Division of the Department of Justice, Dr. Turner has, as we understand it, the necessary authority to initiate investigations of possible antitrust violations, including investigations of the kind requested by the plaintiff here. Having already physically seen sufficient evidence to support, in his view, a judicial finding of unlawful exclu-

sive dealing on the part of this defendant, and having publicly expressed his conviction that the public interest involved in remedying that violation is sufficiently great to merit the attention of this Court, it must be assumed, and the plaintiff does assume, that Dr. Turner will now use every resource at his command to bring the defendant's practices into line with the rule of law urged on the court in the *amicus* brief, of the United States here, namely, the rule that a refusal to deal is actionable under Section 4 of the Clayton Act "when it is used to secure, or in an attempt to secure, agreement to a proposal which, if acceded to, would (1) comprise one of a set of contracts in unreasonable restraint of trade, or (2) constitute one of a number of sales agreements made on condition or understanding of exclusive dealing." *Id.*, p. 12.

No substantial "right" of the defendant would be prejudiced by the granting of plaintiff's request for rehearing and by reserving ruling on the petition for certiorari at the present time. On the other hand, a final denial of certiorari will not only deny this plaintiff any hope of redress after completion of the anticipated government prosecution but will, in addition, leave standing an unfortuate precedent to burden the government's efforts in the lower courts. By reserving ruling now, the Court can not only avoid those two undesirable results but secure an added, affirmative public benefit as well: when the Court later passes on the important public policy questions presented here by the practices of this defendant, that judgment will then be enlightened by a full adjudicative record in the government's case, a record shaped by the litigants and the lower courts in the full knowledge of its ultimate review by this Court and one thus expressly designed to show the Court "the economic and business stuff" involved to a far greater extent than any private plaintiff's limited resources would be likely to permit. Finally, the plaintiff respectfully urges that the reservation of the Court's ruling on the petition for certiorari now would have a profound effect on the incentives of private plaintiffs such as itself to continue serving "the important public purpose of supplementing the government's enforcement activities, and

thus play a major role in obtaining compliance with those laws." *Id.*, p. 4.

It would seem to be particularly consistent with the maintenance of those incentives to preserve for a plaintiff that has exhausted its resources in developing the facts of an antitrust case of significant public importance, and in presenting those facts to the appropriate public officials, an opportunity to ultimately obtain redress for its own private injuries after having helped to secure that larger public interest.

The petition for certiorari presented questions based upon the proffer of evidence and actual uncontradicted evidence relating to other similar refusals to deal as well as to pressures exerted by the Defendant through its district representatives on dealers to stop selling competing products. Evidence of this type was evidently rejected by the district court in its oral opinion given immediately upon the close of argument as well as the Court of Appeals even though the court stated to the Plaintiff, at page 84 of Defendant's Appendix "to *require* you to make a specific proffer."

The Court delivered an oral, off the cuff opinion and recited only those facts which supported *its* conclusion of law not mentioning other uncontradicted facts critical to a different legal conclusion. There was no attempt to make findings of fact as such. This Court has evidently concurred that the District Court judge became the "unfettered trier of fact" due to the non-jury nature of the proceeding in spite of the summary techniques utilized and has accepted its opinion as findings of fact. For the purposes of this Petition for Rehearing, the Petitioner is bound by that decision. However, there is uncontradicted evidence not mentioned in the opinion which gives rise to violations of the Sherman Act not presented in the Petition for Certiorari. The acts complained of in the instant case, assuming the acceptance of the proffered and uncontradicted evidence (which Petitioner and the Justice Department did in their Petitions) in the opinion of counsel, fell so far within the guidelines established by this court in dealing with anti-

trust violations, that virtually Petitioner's entire petition for certiorari was devoted to the economic effects of the violation rather than specific legal argument on the nature of the violation. Neither Petitioner nor the Department of Justice in its Amicus brief anticipated this procedural difficulty.

Since the Petitioner believes sufficient public interest in the issues presented has been shown in its petition for certiorari, it can only conclude that this Court's denial of certiorari is based either upon an acceptance of the Respondent's argument that nothing more was proven than a single refusal to deal by a firm admittedly possessing 60% of its national market or that the refusal to deal in and of itself, establishes a lack of agreement or combination sufficient for a Sherman Act, Section 1 or Clayton Act violation.

The petitioner in its petition to this Court chose to emphasize evidence it believed was erroneously rejected by the District Court[1] which, once accepted by this Court, would unquestionably establish a violation of the antitrust laws and be the basis for this Court's granting of certiorari.

There is however, other uncontradicted evidence supporting a violation of Section 2 of the Sherman Act, specifically, the attempt to monopolize provisions. To establish this violation requires proof of specific intent to monopolize and possibly proof relating to a dangerous possibility of success.

The District Court in its opinion, at Plaintiff's appendix page 20 stated:

> ". . . I am inclined to the view that giving the Plaintiff all of the benefits and favorable inferences which I think it is entitled at this stage of the proceedings, . . . there was sufficient evidence to require a defense on the item of specific intent. . ."

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[1] Paul Wright's testimony relating to similar acts and the proffered testimony incriminating other district representatives and officials of Outboard of similar anti-competitive actions.

It was only the District Court's inability to appreciate the significance of the Defendant's 60% market share that caused it subsequently to make statements casting doubt upon the proof relating to specific intent. However, aside from the District Court's statement and aside from the entire proffer of evidence and aside from Paul Wright's testimony relating to threats and pressures on dealers who desired to sell competing products, in determining whether this defendant had an intent to monopolize its acts must be measured by the principals established by this Court in the *Times Picayne v. U.S.* case, 345 U.S. 594 (1953) e.g. whether or not the conduct complained of is explainable as normal legitimate business conduct. Other criteria for gauging the intent of a manufacturer in refusing to deal relate to the reasonableness of the act and whether there is any social or economic justification for the action. The act, insofar as Outboard Marine Corporation is concerned, of necessity is unreasonable unless there was an intent to achieve something more than the mere ouster of a single dealer. No manufacturer would refuse to deal with the customer that is giving him 40% more business than any other of his dealers in a three state area, as was Amplex. No social or economic justification for the refusal to deal has been shown. One fact that cannot be denied the Petitioner before this Court is the refusal to deal by Outboard was motivated solely by Outboard's desire that Amplex sell its engines exclusively. Further, the Petitioner cannot be denied the established fact that a refusal to deal for this reason was in direct violation of the Defendant's own written policy, Dx. No. 9, Plaintiff's Appendix 142, which specifically prohibited refusals to deal for this reason. The act just cannot be explained as normal legitimate business conduct since it violates the Defendant's own alleged operating procedure. If not normal and legitimate, the only other purpose must relate to an intent to further increase or maintain its already 60% share of the market by the exclusion of Mercury from Amplex. There is no other explanation for the refusal to deal. Since the refusal to deal is not ex-

plainable as normal, legitimate business conduct and lacks all social or economic justification, the specific intents requirement is satisfied.

With reference to the argument presented by Outboard relative to the requirement that there must be proven an intent to do more than the specific act, though the Petitioner believes it has convincingly satisfied that standard through its proffer of testimony, directs the Court's attention to the *Swift and Company v. United States* case, 196 U.S. 375 where it was stated that when the overt act is set within a framework of ability to consummate a substantive offense, either by the forces of nature or the perpetration of some further act, the conduct or element of an attempt to monopolize is satisfied. The ability of Outboard to consummate an offense is self-evident in this record from the evidence relating to its market percentage, product differentiation, percentage of outlets controlled, dealer dependence upon the defendant, weakness of its competition and the defendant's system of inspecting its dealer's establishment. Even if this defendant did not in fact have monopoly power, which is most difficult to accept, in an attempt to monopolize situation, all that need be shown is the near occurrence of monopoly power. With an existing 60% of the market it cannot be said that this defendant is not near, if it does not in fact possess, monopoly power.

If Outboard does have monopoly power or is likely to acquire such power, then it is guilty of monopolization under Section 1 if it undertakes or attempts to undertake an act which tends to strengthen its market position.

Paraphrasing the *U.S. v. Swift and Company*, supra, dangerous possibility test, if the defendant's acts in the instant case are insufficient in and of themselves to constitute monopolizing, by virtue of its market position, it has the power to accomplish the required further acts to bring this result to pass and therefore, an intent to bring it to pass produces a dangerous probability that it will happen and the offense of attempting to monopolize is completed.

Further, Justice Cardozo, speaking for the Court in the *U.S. v. Swift and Company* case, supra, stated:

> "Size carries with it an opportunity for abuse that is not to be ignored when the opportunity is proved to have been utilized in the past."

This defendant was ordered by the Federal Trade Commission to cease and desist by the Federal Trade Commission in 1956 the very activities of which the petitioner now complains.

The petitioner firmly believes it has proven the requisite intent on the part of Outboard not only by virtue of the testimony relating to similar happenings as testified to by Paul Wright and as stated in the proffered testimony, but this intent is firmly established by the defendant's exhibit No. 47, Appellant's Appendix page 148 where Mr. Schiavina refers to Mr. Nat Gates's agreement to stop selling the Mercury engine about one year from the date he acquired his Johnson franchise and the subsequent honoring of that agreement, when, 16 months later, Mr. Gates no longer sold Mercury engines but dealt in Johnson exclusively.

Lessig v. Tidewater, 327 F.2d 451 (1964) specifically held that dangerous probability of success is not a necessary element of proof in an attempt to monopolize case on the basis that the actor is in the best position to determine the likelihood of success of his action. The District Court in the instant case stated that it was attracted to the doctrine of *Lessig* (see Petitioner's Appendix pg. 16) but that it was bound by the contrary law of the Fourth Circuit as set forth in the case of *McElhenney and Company v. Western Auto Supply Company*, 167 F. Supp. 949 (1959). The conflicting requirements between the 9th and 4th Circuit necessary to establish an attempt to monopolize is thus directly presented.

In any event, the necessary elements to establish a dangerous possibility of success if Outboard has a specific intent to monopolize is established in this record. It just cannot be said that a firm controlling 60% of a national market with

the balance of the competition divided amongst the 11 other competitors (about 4% per competitor) and controlling up to 72% of all outlets of distribution does not satisfy the dangerous possibility of success requirement necessary to complete the violation of an attempt to monopolize.

There is also a violation of Section 1 of the Sherman Act based upon a standard not previously presented to this Court. The evidence undeniably established that Paul Wright, the district representative of the defendant in 1960, told the plaintiff that it must phase out the competing Scott engine it was then selling. Both Paul Wright and Nicholas Canzona, plaintiff's president, so testified without contradiction. The petition did in fact substantially reduce its purchases of Scott engines. It was the attempt by the defendant to expand the agreement made by Paul Wright and the Petitioner, that resulted in the refusal to deal.

As Mr. E. Compton Timberlake stated in his recent antitrust work, *Federal Treble Damage Antitrust Suits* (1965) at pages 181-182.

> "There can be no doubt that an independent refusal to deal may be unlawful;[2] however, this right is not without some qualification. Where the refusal to deal is an exercise of monopoly power OR where the refusal to deal is because the buyer will not join with the seller in a contract OR COURSE OF CONDUCT violative of the antitrust laws, such refusal to deal may be held to violate Section 1 or 2 of the Act."[3] (emphasis supplied)

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[2] *House of Materials, Inc. v. Simplicity Pattern Co.*, 298 F.2d 867 (2d Cir. 1962) and cases listed in *Albert H. Cayne Equipment Corp. v. Union Asbestos and Rubber Co.*, 220 F. Supp. 784, 786 (S.D.N.Y. 1963); accord: *Best Advertising Corp. v. Illinois Bell Tel. Co.*, 229 F. Supp. 275 (S.D. Ill., 1964).

[3] *U.S. v. Parke-Davis & Co.*, 362 U.S. 29 (1960). See A Simple Refusal To Deal, 71 Yale L. J. 1565 (1962); Customer Selection or Dealer Protection 22ABA AntiTrust Section 49; Doric Simplicity or Dirty Pool, 29 U. Det. L. J. 414 (1962).

It was Amplex's refusal to agree with the Defendant on a course of conduct which, if done, would most certainly have satisfied the requirement of "agreement" requisite to a Section 1 or Clayton Act violation that prompted the refusal to deal. Amplex is being denied legal redress for having refused to participate in an illegal course of conduct.

CONCLUSION

For the reasons set forth in this Petition for Rehearing as well as in the Petition for Certiorari previously filed, rehearing should now be granted and either certiorari granted or ruling reserved until the Antitrust Division of the Department of Justice has determined what proceedings, if any, the public interest requires against this defendant and, if any such proceeding is undertaken, until it shall have been completed.

Respectfully submitted,

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CERTIFICATE OF COUNSEL

Pursuant to Rule 58, we hereby certify that the foregoing Petition for Rehearing is presented in good faith and not for delay, and is restricted to the grounds specified in paragraph 2 of Rule 58.

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